Supreme Court of the United States

OCTOBER TERM, 1965

No. 219

JOHNNIE K. BAXSTROM, PETITIONER

vs.

R. E. HEROLD, DIRECTOR, DANNEMORA STATE HOSPITAL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

Form 478-D.M.H.—(Rev. May 1941)

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

DANNEMORA STATE HOSPITAL

RECEIVED
AUG 20 1965
OFFICE OF THE CLERK
SUPREME COURT, U.S.

FORM FOR THE CERTIFICATION OF INSANE PRISONERS AFTER THE EXPIRATION OF THEIR TERMS, PURSUANT TO ARTICLE 15, SECTION 384 OF THE CORRECTION LAW.

Section 384. "Certification of insane prisoners after the expiration of their terms. 1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments. The costs necessarily incurred in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora state hospital, and be paid in the same manner as are other expenses of such hospital.

"2. A patient committed to the custody of the commissioner of mental hygiene and placed in an appropriate institution in the department of mental hygiene or the department of correction pursuant to the provisions of this section may at any time during the period of his commitment be transferred to an appropriate state institution in the department of mental hygiene or in the department of correction, which has been designated for the custody of such patient by agreement between the heads of the two departments.

"3. All persons retained in Dannemora state hospital pursuant to a valid order of retention issued in accordance with the provisions of this section prior to September first, nineteen hundred sixty-one shall be deemed to have been committed to the custody of the commissioner of mental hygiene pursuant to subdivision one of this section and shall be deemed to have been placed in the custody of Dannemora state hospital by designation of the commissioner of mental hygiene and the commissioner of correction pursuant to subdivision one of this section. Any such patient in the Dannemora state hospital may be transferred to any appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such patient by agreement between the heads of such departments."

[fol. 2]

PETITION

(6)

STATE OF NEW YORK

SURROGATE'S COURT: CLINTON COUNTY

IN THE MATTER OF THE APPLICATION OF
W. C. Johnston, M. D.
DIRECTOR OF DANNEMORA STATE HOSPITAL
FOR THE CERTIFICATION OF
John K. Baxstrom #6887
AN ALLEGED INSANE PRISONER

The Petition of W. C. Johnston, M. D. respectfully shows to this Court

(1) That he is the Director of Dannemora State Hospital, located in the Village of Dannemora, County of Clinton, State of New York.

(2) That the above named John K. Baxstrom is now a prisoner confined in said Dannemora State Hospital, that his term of imprisonment is about to expire and, in the opinion of your Petitioner, such prisoner continues insane.

(3) That the facts upon which the application is based are as follows:

(The petition should state the facts observed by, or the information known to, the petitioner, which would tend to show the existence of mental illness, such as irrational acts or statements, attempts at suicide and attempts or threats to injure others. It is important to describe any change that has occurred in the behavior and character of the patient.)

This patient was admitted here on June 1, 1961 from Attica Prison. He is suffering from epilepsy and when having fits, he is violent and dangerous. He has had several epileptic seizures since his admission and is still in need of medication and hospitalization. His diagnosis is Psychosis due to Convulsive Disorder, Epileptic Deterioration.

(4) That he verily believes it to be for the best interest of the said person that an order be granted directing his certification to the custody of the Commissioner of Mental Hygiene.

(5) Upon information and belief that the following are the names and addresses of living close relatives of the patient: (All must be given.)

fol. 3]

Name	Approximate age	Number and street	City, town or P.O.
Willie Baxstrom		Deceased	
Sarah(Carr) Baxstrom		Deceased	
Mrs. Mary Smith		2920 Westwood Ave.	Baltimore, Maryland
Alberta Ceiley	42	519 Dracena St.	Bakersfield, Calif.
Annie Baxstrom	17	"	"
Janie Baxstrom	16	"	"
Viola Baxstrom	15	"	"
Mary Baxstrom	14	"	"
Willie Mae Baxstrom	13	"	"
Elizabeth Baxstrom	12	"	"
Johnnie Baxstrom, Jr.	11	"	"
James B. Baxstrom	10	"	"
Charles Baxstrom	(Add sheet if necessary)		"

herefore, upon this petition and the medical certificate(s) of examining physicians hereto annexed, your petitioner that an order be granted certifying that the said person is in need of care and treatment and committing him to ustody of the Commissioner of Mental Hygiene.

W. E. Thurston M.D.
(Petitioner's signature)

Director
Dannemora State Hosp., Dannemora, N.Y.
(Petitioner's address)

ted November 22, 1961 19

MEDICAL CERTIFICATE(S) OF EXAMINING PHYSICIANS

(Medical certificate(s) shall be filled out only by two examining physicians)

(a) History Obtained by Physicians

ormation furnished by Records State Hosp of Dannemora N. Y.
s a Custodian of the patient.
Patient is at Dannemora county of Clinton
y: state or country USA; if foreign, date of arrival in U. S.
f entry Steamship or line
nd place of birth 12 Aug 1918 Greensboro N.C. Is he a citizen of the U. S.? Yes
a legal resident of New York State? Yes If so, of what county, city or town Syracuse N.Y.
ong has he resided in New York State? 12 Yrs Address of patient 511 Almond St
(No. street) (City or town)
than five years in New York State, indicate number of years and States of previous residence

; color Black occupation Const. worker single, ~~married~~, ~~widowed~~, separated, ~~divorced~~ Religion Prot.
(Strike out words not required)
ent a veteran? Yes ✓ No Which war? WW II
n of service Army Service Serial No. 34850265
of discharge Hon. Compensation or Pension No.
lity for which veteran is receiving compen[illegible] or pension

[fol. 4]

Birthplace of father USA : of mother USA

Legal residence of father, if living —

Legal residence of mother, if living —

Name and address of nearest known relative (state relationship), committee or correspondent sister
Mrs Mary Smith 2920 Westwood Ave Balt. Md.; Sarah Sherman Bd. 3
Corfu, Ny

Has the patient had any mentally ill relatives? —

If so, state what relationship and whether paternal or maternal —

Have any of the relatives been in institutions for mental illness? —

If so, state name and relationship and give name and location of institution —

Has the patient been considered as of normal mental standard? yes

Institution or institutions where cared for in previous attacks, if any (give dates) —

Has patient been discharged from last institution? —

Has the patient had treatment for syphilis? No

To what extent does he use liquor? Mod tobacco? mod drugs? No

When did present attack begin? —

What is characterized by depression, excitement, untidiness, destructiveness, suicidal or homicidal tendencies, delusions, hallucinations, etc.? Epileptic stupor, assaultive, aggressive

What was first noticed? aggressiveness

Past significant physical disease Epilepsy

(b) Examination by Physician(s)

Physical condition (including any special test report) physical health good

Mental condition: The conduct of the patient (including the statements made to us by others) has been
Jolly, complains is irritable, confused, aggressive

[fol. 5]

The patient showed the following psychiatric signs and symptoms — lacks insight

Does the patient show a tendency to injure himself? no or to injure others? possibly

What dangerous tendencies does the patient show? —

We (I) W W JOHNSON (Print name plainly) a legal resident of Plattsburgh

county of Clinton State of New York and IRA A ROWLSON (Print name plainly)

a legal resident of Plattsburgh, county of Clinton, and State aforesaid, do (severally) certify with the exceptions which are hereinafter noted, as follows:

1. I am a reputable physician, duly licensed to practice medicine in New York State, and have been in the actual practice of my profession for at least three years.

2. I have with care and diligence personally observed and examined on the date of the certificate, namely, on the 24 day of Nov 1961 John K Boxstrom #6887 (Insert name of patient) now residing or being at Dannemora, in the county of Clinton and as a result of such (joint) examination, find and hereby certify to the fact that his condition is such as to require care and treatment in a state institution for the mentally ill, under the provisions of the statutes.

3. I have formed this opinion from the history of the case and my examination of the patient as given above.

4. It is my opinion that personal service on said patient would be detrimental to said patient for the following reasons:

he will be pound

5. I hereby certify that the facts stated and information contained in this certificate are true to the best of my knowledge and belief.

William W Johnson, M.D.

Plattsburgh, N. Y. (Address)

Ira A Rowlson M.D

Plattsburgh N Y (Address)

Dated 24 Nov 1961

[fol. 6]

(c) Examination by Physician

Physical condition (including any special test report) _____

_____

_____

_____

Mental condition: The conduct of the patient (including the statements made to us by others) has been _____

_____

_____

_____

_____

The patient showed the following psychiatric signs and symptoms _____

_____

_____

_____

_____

_____

Does the patient show a tendency to injure himself? _____ or to injure others? _____

What dangerous tendencies does the patient show? _____

_____

_____

I, _____ a legal resident of _____
(Print name plainly)

county of _____, State of New York, certify with the exceptions which are hereinafter noted, as follows:

1. I am a reputable physician, duly licensed to practice medicine in New York State, and have been in the actual practice of my profession for at least three years.

2. I have with care and diligence personally observed and examined on the date of the certificate, namely, on the _____ day of _____, 19__, _____ now residing or
(Insert name of patient)
being at _____, in the county of _____, and as a result of such examination, find and hereby certify to the fact that his condition is such as to require care and treatment in a state institution for the mentally ill, under the provisions of the statutes.

[fol. 7]

3. I have formed this opinion from the history of the case and my examination of the patient as given above.

4. It is my opinion that personal service on said patient would be detrimental to said patient for the following reasons:

_____

_____

5. I hereby certify that the facts stated and information contained in this certificate are true to the best of my knowledge and belief.

_____

Dated _____, 19____ _____
(Address)

CERTIFICATE OF JUSTICE OR JUDGE RELATING TO PERSONAL SERVICE

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

Before the Hon. Robert S. Long, ~~Justice~~ Surrogate ~~or Judge~~

on the 6th day of Dec, 1961

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

(1) I do hereby certify that, as appears by the affidavit of service herein, personal service has been made upon the alleged mentally ill person above named on November 24, 1961 and upon Miss. Mary Smith Mrs. Albert Smith who is Sister Wife (State relationship) of the alleged mentally ill person, ~~or with whom he resides or at whose house he is (strike out words not required)~~ by 2920 Westwood Avenue 519 Dracena St. Baltimore, Maryland Bakersfield, California who resides in the city, ~~town or village~~ of Unknown Unknown in the county of Unknown Unknown

[redacted]

_____

Robert S. Long
~~Justice~~ Surrogate ~~or Judge~~

[fol. 8]

Form 477a-D.M.H.—(May 1961)

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

SERVICE OF NOTICE UPON THE ALLEGED MENTALLY ILL PERSON AND/OR OTHERS

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

To Miss Mary Smith, 2920 Westwood Avenue, Baltimore, Maryland
(Name of person served)

TAKE NOTICE that on the petition of W. C. Johnston, M. D.
and the certificate(s) of Doctors William W. Johnson and
Ira A. Rowlson, an application will be made before the
Honorable Robert S. Long, ~~Justice~~ Surrogate ~~or Judge~~ of the Surrogate's
Court at the Surrogate's Office in (city, ~~town or village~~) Plattsburgh, New York
at 10:00a. m., on the 6th day of December, 1961,
for an order certifying said alleged mentally ill person to the custody of the Commissioner of Mental Hygiene.

AFFID

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATI
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

STATE OF NEW YORK:
COUNTY OF CLINTON } ss.:

Roland Tatro

#1-INSTRUCTIONS TO DELIVERING EMPLOYEE
☐ Deliver ONLY to addressee ☐ Show address where delivered
(Additional charges required for these services)

RETURN RECEIPT
Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)
× Mary Smith

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED: 11/27/61

ADDRESS WHERE DELIVERED (only if requested in item #1)

CSC—10—71588-4 GPO

11 years of age, and resides at Dannemo[illegible], ——, that on the 27th day
of November, 1961, at Dannemora, New York
he served a notice of application for an order adjudging such person to be mentally ill upon
Miss Mary Smith, 2920 Westwood Ave., Baltimore, Maryland
(Name of person served)
by delivering a true copy of said notice personally ~~by Placing in U.S. Mail, Registered, Return Receipt Requested.~~ to the
the served served as aforesaid to be sister of alleged mentally ill person
(State whether person served is the alleged mentally ill person. If not, state relationship)

Sworn to before me this 24th
day of November, 1961
Orew F. Henry
Notary Public
(Orew) F. HENRY
NOTARY PUBLIC IN THE STATE OF NEW YORK
RESIDING IN THE COUNTY OF CLINTON
MY COMMISSION EXPIRES MARCH 30, 1962

Roland Tatro
(Signature of server of notice)

[fol. 9]

Form 477a-D.M.H.—(May 1961)

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

SERVICE OF NOTICE UPON THE ALLEGED MENTALLY ILL PERSON AND/OR OTHERS

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

To Mrs. Alberta Smith, 519 Dracena St., Bakersfield, California
(Name of person served)

TAKE NOTICE that on the petition of W. C. Johnston, M. D.
and the certificate(s) of Doctors William W. Johnson and
Ira A. Rowlson, an application will be made before the
Honorable Robert S. Long, Justice, Surrogate ~~or Judge~~ of the Surrogate's
Court at the Surrogate's Office in (city, town or village) Plattsburgh, New York
10:00 a. m. on the 6th day of
for an order certifying said alleged mentally ill person to the

#1-INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Deliver ONLY to addressee ☐ Show address where delivered

(Additional charges required for these services)

RETURN RECEIPT

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)

Alberta

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED: 11-28-61

ADDRESS WHERE DELIVERED (only if requested in item #1)

AFFIDAVIT O

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

STATE OF NEW YORK:
COUNTY OF CLINTON } ss.:

Roland A. Tatro, being duly sworn, says that he is over
21 years of age, and resides at Dannemora, New York; that on the 24th day
of November, 1961 at Dannemora, New York
he served a notice of application for an order adjudging such person to be mentally ill upon
Mrs. Alberta Smith, 519 Dracena Street, Bakersfield, California
(Name of person served)
by delivering a true copy of said notice personally ~~to the said person named therein~~ by placing in U.S. Mail, Registered, Return Receipt Requested.
He served served as aforesaid to be wife of alleged mentally ill person
(State whether person served is the alleged mentally ill person. If not, state relationship)

Sworn to before me this 24th
day of November, 1961

Oren F. Henry
Notary Public
(Official title)
OREN F. HENRY
NOTARY PUBLIC IN THE STATE OF NEW YORK
RESIDING IN THE COUNTY OF CLINTON
MY COMMISSION EXPIRES MARCH 30, 1962

Roland A. Tatro
(Signature of server of notice)

[fol. 10]

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

SERVICE OF NOTICE UPON THE ALLEGED MENTALLY ILL PERSON AND/OR OTHERS

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF

John K. Baxstrom #6887

AN ALLEGED MENTALLY ILL PERSON

To John K. Baxstrom #6887
(Name of person served)

TAKE NOTICE that on the petition of W. C. Johnston, M. D.
and the certificate of Doctors William W. Johnson
and Ira A. Rowlson, an application will be made before the
Honorable Robert S. Long Justice Surrogate ~~or Judge~~ of the Surrogate's Court
at the Surrogate's Office in (city, ~~town or village~~) Plattsburgh, New York
at 10:00 a.m., on the 6th day of December, 1961, for an order
committing said alleged mentally ill person to the custody of the Commissioner of Mental Hygiene.

Wincenty Natkanski, M. D.
(Name of server of notice)

AFFIDAVIT OF SERVICE

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF

John K. Baxstrom #6887

AN ALLEGED MENTALLY ILL PERSON

STATE OF NEW YORK
COUNTY OF CLINTON } ss.:

Wincenty Natkanski, M. D., being duly sworn, says that he is over
21 years of age, and resides at Dannemora, New York; that on the 24th day
of November, 1961 at Dannemora, New York
he served notice of application for an order adjudging such person to be mentally ill upon
John K. Baxstrom #6887
(Name of person served)
by delivering a true copy of said notice personally and leaving the same with him. He further says that he knew
the person served as aforesaid to be alleged mentally ill person
(State whether person served is the alleged mentally ill person. If not, state relationship)

Sworn to before me this 24th
day of November, 1961

Oren F. Henry
Notary Public
(Official title) OREN F. HENRY

Wincenty Natkanski M.D.
(Signature of server of notice)

NOTARY PUBLIC IN THE STATE OF NEW YORK
RESIDING IN THE COUNTY OF CLINTON
MY COMMISSION EXPIRES MARCH 30, 1962

[fol. 11]

ORDER OF HEARING

(If a hearing before a judge or referee be granted upon the demand of a relative or near friend or upon the motion of the judge, the following form shall be used, otherwise it should be omitted.)

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

Before the Hon. Robert S. Long, Justice, Surrogate ~~or Judge~~

on the 6th day of Dec, 1961

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

An application for an order of certification of the above person, based upon the petition of W. C. Johnston, M.D. and upon a medical certificate dated November 24, 1961 having been made, and (state name of relative and degree of relationship, or if none, name of near friend) W. C. Johnston, M. D. having demanded a hearing upon such application, it is hereby ORDERED, That a hearing on such application for an order of certification be had before the Honorable Robert S. Long, Justice, Surrogate ~~or Judge~~ of the Surrogate's Court at the Surrogate's Office in (city, ~~town or village~~) Plattsburgh, New York County of Clinton on the 6th day of December, 1961, at 10:00 A.M. at which time testimony shall be heard touching the alleged mental illness of the aforesaid person, and if it be deemed advisable, said person may be examined either in or out of court.

The judge may (or if a referee be appointed, the referee herein named shall) hear such testimony and make such examination and report the same at once with the decision (or opinion) as to the mental illness of such person.

And that this order be served upon W. C. Johnston, M. D., the petitioner, and the following named persons:

John K. Baxstrom #6887 of Dannemora State Hospital
Miss Mary Smith, 2920 Westwood Avenue Baltimore, Maryland
~~Mrs.~~ Alberta Smith, 519 Dracena Street of ~~Bakersfield~~, California

Robert S. Long
(Justice, Surrogate ~~or Judge~~)

DECISION OF COURT AFTER HEARING

(Decision of court to be used only if a hearing is had)

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom, #6887
AN ALLEGED MENTALLY ILL PERSON

A hearing having been had upon the application of W. C. Johnston, M.D., for an order certifying that the said person is in need of care and treatment and committing him to the custody of the Commissioner of Mental Hygiene to be placed in an appropriate state institution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such person by agreement between the heads of the two departments on the 6th day of December, 1961, and testimony having been taken as required by law, I do hereby decide that the said alleged mentally ill person is in need of observation and treatment in a state institution for the care and treatment of the mentally ill.

Dated the 6th day of December, 1961

Robert S. Long
(Justice, Surrogate ~~or Judge~~)

[fol. 12]

ORDER OF CERTIFICATION

STATE OF NEW YORK

Surrogate's COURT, COUNTY OF Clinton

Before the Hon. Robert S. Long, Justice, Surrogate ~~or Judge of~~ of Clinton
(Print name plainly)

~~County~~ county, city ~~or town~~ of Plattsburgh on the 22 day of November, 1961,

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom, #6887
AN ALLEGED MENTALLY ILL PERSON

Upon the petition of Dr. C. Johnston, M.D., dated November 22, 1961 and (a) medical certificate(s) made by two examining physicians, which medical certificate(s) are dated on the 22nd day of November, 1961, and on the 22nd day of November 1961, and which are annexed hereto and upon such other facts and information as were produced before me (or a referee appointed by me), and being satisfied that the above alleged mentally ill person may require mental care and treatment in a state institution for care and treatment of the mentally ill within the meaning of the statute, and that he is not in confinement under a criminal charge, it is therefore hereby

ORDERED, that the said John K. Baxstrom #6887 be committed to the custody of the Commissioner of Mental Hygiene to be placed in an appropriate state institution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such person by agreement between the heads of the two departments.

ORDERED, That the director of the said institution forthwith at the time of the admission of said alleged mentally ill person to said institution, forward a verbatim copy of the entire proceedings herein to the office of the Clerk of Clinton County.

ORDERED, That the said papers so sent shall be sealed in the office of the County Clerk of _____ County, and be exhibited only to the parties to the proceedings, or someone properly interested, upon the order of the Court.

Dated December 6, 1961.

Rob't S. Long
(Print name) Surrogate ~~or Judge~~

(A copy of the entire proceedings must also be filed in the Department of Mental Hygiene when the patient is in a Department of Corrrection institution.)

[fol. 13]

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE

PETITION, CERTIFICATE AND ORDERS

In the Case
of
John K. Baxtrom

Resident of Syracuse, N.Y.
County Onondaga
Institution Dannemora State Hospital
Date of admission June 1, 19 61
No. of case book Page
No. for year 45
Consecutive No. 6887
Identification No. 78 97 55
Date of order of certification December 6, 19 61
Copy sent to clerk of Clinton County
on December 7, 1961
Copy sent to Department of Mental Hygiene
(Not applicable to Rose Institutions)
Dept. of Mental Hygiene)
on December 7, 1961

I, the Director of the Dannemora State Hospital,
do hereby certify that the document together with
the papers annexed hereto, on which the words of
this certificate are impressed, is a true copy of
the order and all the papers upon which the above
named patient was admitted to this hospital.

Director

RECEIVED
DANNEMORA STATE HOSPITAL
DEC 7 - 1961

[fol. 14]

IN THE SURROGATE'S COURT, COUNTY OF CLINTON, NEW YORK

[File Endorsement Omitted]

IN THE MATTER OF THE APPLICATION OF
W. C. JOHNSTON, M. D., Director of the Dannemora State Hospital for the Certification of

JOHN K. BAXSTROM, # 6887, Criminal Index # 58
An Alleged Insane Prisoner.

A proceeding held at the Surrogate's Court Chambers, Plattsburgh, New York, at 10:00 A. M., before Honorable Robert S. Long, Clinton County Surrogate, December 6, 1961.

THE COURT: Are you John K. Baxstrom?

PATIENT: Yes, sir.

THE COURT: Mr. Baxstrom, my name is Robert S. Long and I am the Surrogate Judge of the County of Clinton. Surrogate's Court is known as a Court of Record under the laws of the State of New York, and the Hospital where you are a patient is located at Dannemora, New York, which is within the boundaries of Clinton County.

Dr. Johnston, as Director of the State Hospital, on or about November 22, 1961 filed certain papers in Surrogate's Court of this County, which had to do with you. These papers, among other things, stated that the time you owed the State of New York was about to expire, [fol. 15] and that, in his opinion, you were still mentally ill and still in need of hospital and institutional care. Because of these facts, I asked Dr. Johnson, who is in no way related to Dr. Johnston, Director of the Dannemora State Hospital and Dr. Rowlson, both of the City of Plattsburgh to go to the hospital and examine you and your case history. These two doctors have certified to me, in writing, that they did go to the Hospital at Dannemora, New York, and they did examine you and your case

history and that, in their opinion, you are still mentally ill and still in need of hospital and institutional care.

A notice that this hearing was to take place here today was sent by registered mail to Alberta Smith, 519 Dracena Street, Bakersfield, California, and also, a notice was sent to Miss Mary Smith, 2920 Westwood Avenue, Baltimore, Maryland.

Now, besides yourself and myself here today, Mrs Catherine L. McCarthy is the lady sitting in front of you. She is a stenographer and she is making stenographic notes of what transpires at this hearing. Standing near you is an officer on duty at the Dannemora State Hospital, John Mytych of Cadyville, New York. On your right, Mr. Baxstrom, is Charles H. Lewis, an attorney who resides at Peru, New York. He is the Assistant Attorney General, and it is his duty to appear for The People of the State of New York in such cases as this. On his right and my left is Dr. Ross E. Herold, Assistant [fol. 16] Director of the Dannemora State Hospital, who appears in such cases as this.

THE COURT: (Addressing Dr. Herold) Have you heard from any member of this man's family?

DR. HEROLD: No.

THE COURT: At this time, Mr. Baxstrom, I am going to take the testimony of Dr. Herold. At the conclusion of his testimony you have the right to ask the Doctor any question you care to regarding your matter and you also have the right to ask Charles H. Lewis, the Assistant Attorney General any questions, or myself—any one, two or three of us, and you also have the right to make any statement you care to regarding this whole matter.

DR. ROSS E. HEROLD, being duly sworn, testified as follows: —

EXAMINATION BY MR. LEWIS.

Q Your full name, Doctor?
A Ross E. Herold.
Q What is your occupation?
A Assistant Director of the Dannemora State Hospital.
Q Doctor, are you duly licensed to practice medicine in the State of New York?

A I am.

Q Do you specialize in any field of medicine?

A Yes. Psychiatry.

Q Will you please state your qualifications and educa-
[fol. 17] tional training and experience in the field of medicine and psychiatry?

A Graduated in medicine from the University of Toronto, Canada in 1924. Licensed to practice medicine in New York State in 1925. I was with the Department of Mental Hygiene until 1942. From 1942 to 1946 I was on active duty with the United States Navy. Since February 1st, 1946, I have been Assistant Director of the Dannemora State Hospital. I also am a qualified psychiatrist under the laws of the State of New York and have taken post-graduate courses at Columbia University.

Q All right, Sir. Doctor, did you have an opportunity to examine and observe the patient, John K. Baxstrom, who is now before this Court?

A I have.

Q When did you last see him?

A Yesterday.

Q That would be December 5th, 1961, is that true?

A Yes, sir.

Q Are you familiar with his case history, which is kept in the regular course of business at the Dannemora State Hospital, pertaining to this patient?

A I am.

Q Doctor, from your medical training and experience and from your observations and examinations of the patient and from his case history, have you now been able to form an opinion as to whether this man is now
[fol. 18] mentally ill and in need of further institutional care?

A I have formed an opinion that he is still mentally ill and in need of institutional care.

Q Have you formed an opinion as to a diagnosis of his particular type of mental illness?

A Yes. Psychosis due to epileptic deterioration.

Q And it is your opinion, Doctor, that he should have further care in a hospital, such as the Dannemora State Hospital?

A Yes. That is my opinion.

THE COURT: Has this man been examined by someone from the Department of Mental Hygiene?

DR. HEROLD: Yes. On November 27th, 1961.

THE COURT: Do you have any objection to his being transferred to any other institution, a civil institution, if, in the opinion of the Department of Mental Hygiene, he should be transferred?

DR. HEROLD: I have absolutely no objection.

MR. LEWIS: I move his commitment, pursuant to Section 384 of the Correction Law.

THE COURT: Do you have any question you would like to ask of Dr. Herold, Mr. Baxstrom?

THE PATIENT: Dr. Herold, I am at the Dannemora State Hospital since June first, right?

DR. HEROLD: Yes. You came to our hospital June first.

[fol. 19] THE PATIENT: I asked—I know that it is a mental hospital. Am I right? But I don't know how I got there.

DR. HEROLD: You don't know how you got there? You were sent to the Dannemora State Hospital by an order of transfer signed by A. J. May, Acting Warden of Attica Prison.

THE PATIENT: I know that I am an epileptic, but I did not think that that is a form of insanity. I would like to recommend, Sir, that the staff at the hospital review my case.

THE COURT: The question before me today, Baxstrom, is only what the doctors who are at the hospital and the doctors I sent up to examine you, believe your mental condition to be. Whether you stay at the Dannemora State Hospital, or whether you are transferred to some other civil hospital at or near your home is entirely up to the Department of Mental Hygiene and that has nothing to do with Dr. Herold or myself.

(Addressing Dr. Herold) Has this man been examined by Dr. Foster?

A Yes. November 27th, 1961.

THE COURT: (Addressing the Patient) You were examined by Dr. Foster on November 27th. He is a rep-

resentative of the Department of Mental Hygiene. He will make a report. If he reports that he thinks you are a subject for transfer to a civil hospital, then you will be [fol. 20] transferred. It is entirely up to that Department.

THE COURT: (Addressing Dr. Herold) Have you any objection if this man is transferred to a civil hospital if the Department of Mental Hygiene so decrees?

DR. HEROLD: None whatever.

THE COURT: And I, Sir agree with you. I have no objection to his transfer if the Department of Mental Hygiene so finds.

I hope that you will be transferred to a civil hospital. Good luck.

Hearing closed.

[Stenographer's Certificate to foregoing transcript omitted in printing.]

[fol. 21]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

WRIT OF HABEAS CORPUS—issued March 16, 1962

THE PEOPLE OF THE STATE OF NEW YORK

To Dr. W. C. Johnston, M. D., Director,
Dannemora State Hospital, Dannemora, New York

We command you, that you have the body of JOHN K. BAXSTROM by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said JOHN K. BAXSTROM is called or charged, before Hon. Michael E. Sweeney, a Justice of the Supreme Court of the State of New York, at the Court House in the City of Plattsburgh, New York, forthwith, on the 10th day of April, 1962 at 10 a.m. in the forenoon of that day, or as soon thereafter as the matter may be heard, to do and receive what shall then and there be considered, concerning the said JOHN K. BAXSTROM and have you then there this Writ.

Witness, Hon. Robert G. Main, one of the Justices of the said Court, the 16th day of March, 1962.

HALSEY J. STARK
Clerk

The within Writ is hereby allowed this 16th day of March, 1962.

/s/ Robert G. Main
J. S. C.

[fol. 22]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

IN THE MATTER OF THE APPLICATION OF JOHN K. BAXSTROM

RETURN TO WRIT OF HABEAS CORPUS—March 29. 1962

The following return to a Writ of Habeas Corpus heretofore granted by the Hon. Robert G. Main, Justice of the Supreme Court, is hereby respectfully made:

I. That W. C. Johnston, M. D. is the Director of the Dannemora State Hospital, and has the care and custody of all patients committed to that institution.

II. That at a Term of the County Court, held in and for the County of Monroe, at the Court House in the City of Rochester, State of New York, on the 23rd day of April 1959, John K. Baxstrom, the relator in the present matter was convicted of the crime of Assault 2°—Violation Section 242-4 Penal Law, and was thereupon sentenced to be imprisoned in the State Prison at Attica.

III. That the said relator was received at Attica Prison April 9, 1959 and subsequently on June 1, 1961 was duly transferred to the Dannemora State Hospital, where he is now detained. That such transfer from Attica Prison to the Dannemora State Hospital was made pursuant to law; that the order for such transfer is now in the possession of the respondent and the respondent begs leave to refer thereto upon the argument of this writ.

IV. That the full term of sentence of said John K. Baxstrom expired on December 18, 1961, and the patient was regularly committed to this hospital on December 6, 1961 as an insane person on the order of Hon. Robert S. Long, Judge of the Surrogate's Court, Clinton County, in accordance with Paragraph 384 of the Correction Law.

V. Section 384, Paragraph 3 of the Correction Law states: "Any such patient in the Dannemora State Hospital may be transferred to any appropriate state institution of the Department of Mental Hygiene or of the De-

partment of Correction as may be designated for the custody of such patient by agreement between the heads of such departments."

[fol. 23] VI. This patient was examined by Dr. Richard V. Foster, Assistant Commissioner for the Department of Mental Hygiene, on November 27, 1961 relative to a transfer to a Civil Hospital and was not considered to be suitable for care in a Civil Hospital.

VII. Deponent further alleges that the said John K. Baxstrom is, in his opinion, an insane person, and that he is in need of further hospital care and treatment.

VIII. That the said John K. Baxstrom is now presented before the Court in obedience to the Writ recently issued.

All of which is respectfully submitted.

Dated at Dannemora, N. Y. this 29th day of March 1962.

/s/ W. C. Johnston, MD.
Director, Dannemora State Hospital

[*Duly sworn to by W. C. Johnston, MD. jurat omitted in printing (all in italics)*]

[fol. 24]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

THE PEOPLE OF THE STATE OF NEW YORK, EX REL JOHNNY K. BAXSTROM, RELATOR

vs.

W. C. JOHNSTON, M. D., Director, Dannemora State Hospital, Dannemora, N. Y., RESPONDENT

Stenographer's Minutes of Proceedings had in the above-named matter, at a Regular Trial Term of the Supreme Court, held in and for the County of Clinton, in the Clinton County Court House, Plattsburgh, N. Y., on the tenth day of April, 1962.

BEFORE: HON. MICHAEL E. SWEENEY, Justice.

APPEARANCES:

The Relator, in person.

Louis J. Lefkowitz, Attorney General of the State of New York, by Charles H. Lewis, Esq., 24 Clinton St., Plattsburgh, N. Y., Assistant Attorney General, for the People.

[fol. 25] THE COURT: You are Johnny K. Baxstrom?
THE RELATOR: Yes, sir.
THE COURT: All right, you may proceed. You may go ahead.

(Mr. Lewis handed a copy of the return to the relator.)

THE RELATOR: (referring to photostatis document) Sir, in November 1959 I was committed as follows: First count. The deponent, on or about November 21, 1958, at the city of Rochester, Monroe County, New York, wilfully, wrongfully and feloniously assaulted Joseph M. C. McCarthy, thereby inflicting upon his person grievous bodily

harm; to wit, puncture wound of the left arm and forehead, two counts. On April 9, 1959, an information was read in open court to this defendant, by John C. Little, Jr., district attorney, charging the defendant with having been previously convicted of the crime of robbery in Circuit Court, Baltimore, Maryland, on December 17, 1954; defendant, having been duly advised of his rights by the court, defendant admitted being the same person mentioned and described therein.

[fol. 26] THE COURT: As I understand it, Mr. Baxtrom, from reading your papers here, it is your contention that your time has expired and you are entitled to an examination at this time as to your sanity, is that correct?

THE RELATOR: Yes, sir.

THE COURT: You feel your time has expired and that you are being held because of your mental condition, that you are entitled to have an independent doctor examine you, to have that matter heard in court, is that correct?

THE RELATOR: Yes, sir. One of the things I most care to refer to the court is I am a veteran of World War II, and my people got me an application for a V. A. hospital, which they got through New York also, and some application was sent to me to sign here in Dannemora State Hospital, which was mailed up to me and not to be opened, folded like this, one afternoon, for me to sign, the application went in to Prairie Point Hospital in Baltimore, Maryland, which is my home, and this is the receipt that they mailed back to me, which I am epileptic, have been ever since 1947, could have been before, I came out [fol. 27] of the Army, I don't know.

THE COURT: You have read the papers, Mr. Lewis. Is there any question about this man being entitled to an examination?

MR. LEWIS: No, sir, we would be happy to afford him the examination by an independent psychiatrist.

THE COURT: All right. I am going to grant your right to an examination here, and I would suggest Dr. Ian M. Kerr, he is from Potsdam, to make the examination, and will you see that that is carried through, Mr. Lewis?

MR. LEWIS: Yes, I will, sir.
THE RELATOR: I appreciate that, sir.
MR. LEWIS: I would like to state on the record, if the officials in Baltimore will take this man, I am sure New York State has no objection to it, we are more than happy to have these fellows transferred to another institution if they will take them. I will look into this.
THE COURT: All right.
THE RELATOR: Thank you, your honor.

[fol. 28]

[Reporter's Certificate to foregoing transcript omitted in printing.]

[fol. 29] At a Regular Trial and Special Term of the Supreme Court, held in and for the County of Clinton, at the Court House, Plattsburgh, N. Y.

* * * *

THE PEOPLE OF THE STATE OF NEW YORK, EX REL, JOHN K. BAXSTROM

-against-

DR. W. C. JOHNSTON, Director Dannemora State Hospital, Dannemora, New York.

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* * * *

May 3, 1962.

BEFORE: HON. MICHAEL E. SWEENEY, Justice.

APPEARANCES:

Louis J. Lefkowitz, Attorney General, by Charles H. Lewis, Assistant Attorney General, for the People.
John K. Baxstrom was present in person.

MR. LEWIS: Mr. Baxstrom.

THE COURT: You are John K. Baxstrom?

MR. BAXSTROM: Yes, sir.

THE COURT: And you have asked previously that you be examined by a doctor and have him report to the Court, is that correct?

MR. BAXSTROM: Yes, sir.

[fol. 30] THE COURT: And you have been examined?

MR. BAXSTROM: Yes, sir.

THE COURT: By Dr. Kerr here?

MR. BAXSTROM: Yes, sir.

THE COURT: All right. You may sit down.

DR. IAN MC DOUGAL KERR, being duly sworn as a witness in behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. LEWIS:

Q. Your full name, Doctor?

A. Ian McDougal Kerr.

Q. Where do you reside, sir?

A. Days Mill, Town of Hopkington, State of New York.

Q. What is your profession?

A. I am a physician and psychiatrist.

Q. Doctor, heretofore today I have asked you certain questions and you have given certain answers regarding your professional qualifications as a physician and psychiatrist. If I were now to ask you those same questions, Doctor, would you give those same answers?

A. I would, sir.

MR. LEWIS: I ask the Court to take judicial notice of the Doctor's qualifications as a psychiatrist.

THE COURT: I have heard the Doctor's qualifications in a previous hearing and they will pertain to all [fol. 31] the hearings here this morning.

MR. LEWIS: Thank you, sir.

Q. Doctor, heretofore and by order of this Court did you examine the person of John K. Baxstrom a patient at Dannemora State Hospital?

A. I did, sir.

Q. Where and when did that examination take place?

A. I examined John K. Baxstrom at Dannemora State Hospital April 27, 1962.

Q. This was a psychiatric examination, was it, sir?

A. Yes, sir.

Q. Will you please tell the Court the results of your examination?

A. During my examination Mr. Baxstrom told me he was forty-three years of age; gave me his date of birth as August 2, 1918. When I asked him why he had been transferred to Dannemora State Hospital, he told me that this was really a mistake.

He claims that whilst he was confined in Attica, that another inmate there told him that Dannemora was a much nicer place because they had television and so forth, and the patient claims that he asked the psychiatrist at Attica on three occasions if he might not be transferred to Dannemora; and that the only way in which this could [fol. 32] be achieved would be for the psychiatrist to say that he was insane.

He then went on to tell me that he has suffered from epilepsy since 1947. He first told me that he had his first seizure in Baltimore in that year, but then went on to say that while serving in the Army in Guam in 1945 he had a blackout of some description, which may have been an epileptic attack.

In 1947 he was admitted to Johns Hopkins Hospital, and from there transferred to a Veterans Administration Hospital, where he claims he remained for two or three weeks under observation because of this epileptic condition. He states that any sort of irritation or excitement will tend to bring on his siezures and claims that the situation in Dannemora State Hospital, namely, the presence of mentally disturbed patients there, tends to make his worse.

At the time of my examination he told me his last siezure had been approximately one week prior to the date on which I saw him, and that previous to this his last previous siezure had been in December. He believes he had about six siezures during the previous year. His siezures are usually apparently proceeded by an odor, that is to say, he gets some warning they are coming on, this

aura, the feeling of dizziness, and what he describes as seeing things before his eyes.

He tells me that he never had any type of epilepsy [fol. 33] in childhood, but he suffered from what he describes as fainting headaches. Now whether these symptoms were a manifestation of some type of epileptic form disorder in childhood I do not know at this time. He served in the United States Army from September '42 to March of 1946, and tells me he received an honorable discharge.

I asked him about his previous health, and he at first told me that he had never had any serious illnesses, but then went on to tell me that in the summer of 1946 he had a car accident in which he sustained a head injury, and told me that he was unconscious he believes for a period of four or five hours following this accident. He admitted that he had been drinking prior to the accident, and was admitted to Rochester Memorial Hospital following this accident for a period of about one week.

He also told me that he was hospitalized in the VA Hospital in Syracuse in 1957 and in 1958, as far as I was able to ascertain because of a flare-up of these epileptic attacks. He admitted that around these times he had been drinking fairily heavily, and he does seem to realize to some extent that drinking does tend to make his epilepsy worse.

He was admitted to prison in April 1959, his crime being an assault second degree, since he apparently attacked and stabbed a police officer in Rochester. And I [fol. 34] understand that his term expired on December 18, 1961. He tells me that he has only had one previous conviction. He tells me he was married in 1946 but was separated from his wife in 1951 and that there were no children by this marriage. His family history is essentially negative, and as far as he knows there is no history of epilepsy in his family.

Mr. Baxstrom's hospital record indicates that following his siezures he becomes quite confused and quite aggressive and asaultive during the post-convulsive period, and this, of course, is a not uncommon happening in cases of epilepsy. I feel that even at the time I saw him, although

he had not had a siezure for a period of one week, I felt there was still some confusion present. I felt his memory was somewhat impaired. He had difficulty in recalling some of the facts of his history, and his speech I think is somewhat slurred. In my opinion this man is suffering from epilepsy, the cause of which at the present time I do not think we can definitely pin down. But according to his history it began perhaps in 1945 whilst he was in Guam.

On inquiring further from him he informed me that he did have malaria whilst he was in Guam and he also did acquire a specific infection around that same time, and I think either of these two conditions could be causative factors in producing this epilepsy. It is my opinion that [fol. 35] he is suffering from psychosis with epilepsy. It is my opinion that there is some organic deterioration of his brain present. His record indicates that he becomes confused and is liable to have assaultive tendencies during post-convulsive periods, and it is my opinion that he certainly requires continuing care and treatment in a hospital.

Q. Doctor, when you say he has a psychosis, this is a mental illness, is it, psychosis?

A. Yes, sir.

Q. So that in your opinion then he is now mentally ill, is that true?

A. Yes, sir.

MR. LEWIS: That is all I have.

THE COURT: Mr. Baxstrom, you heard the Doctor?

MR. BAXSTROM: Yes, sir.

THE COURT: Do you have any questions to ask the Doctor?

MR. BAXSTROM: Yes, sir.

THE COURT: Now you may ask the Doctor the questions, but stick to the issues here and don't go off on any side issues or I am going to have to stop you.

MR. BAXSTROM: All right, sir.

THE COURT: All right. You may ask the Doctor any questions pertinent to the issues here.

[fol. 36] MR. BAXSTROM:

Q. Dr. Kerr, sir, did I state to you in the interview that we had, that a mental patient in Dannemora dis-

turbed me and caused commotion and irritation and caused me to have these epileptics? Sir, did I tell you that during the interview?

A. Yes, sir. As I stated, you told me that the disturbance and so forth in the hospital did tend to bring on your attacks.

Q. Yes. And I told you that they really did endanger me instead of helping me and that Dannemora State Hospital was only hurting me because of all these mental patients around?

A. You made this statement, sir, yes.

Q. Yes. And all this commotions and things like this. I also stated to you that my sisters tried to get all kind of ways to get me back to Baltimore. If I could only get back to Baltimore I could get to my own hospital. We have our own hospital insurance. And I said this Dannemora State Hospital—I'm not saying anything about the hospital, not the attendants or nothing at all—but Dannemora State Hospital is not doing me any good. I have had two attacks—

THE COURT: Limit yourself to the questions to the Doctor. Don't make a speech.

MR. BAXSTROM: Yes.

THE COURT: If you have any questions, ask the Doctor a question. Do you have any further questions [fol. 37] to ask the Doctor?

MR. BAXSTROM: No, sir, I do not, sir.

THE COURT: All right.

Q. Do you feel, Doctor, from your examination and examining the records of this man, he needs additional care? Is that correct?

A. Yes, sir. May I say something at this point, sir?

Q. Surely.

A. Since Mr. Baxstrom's sentence has actually expired, sir, I would like to say that in my opinion there is no reason why he could not be treated in a civil mental hospital. I would simply like to say that for the record, sir.

THE COURT: All right.

You understand what that means? That the Doctor feels that perhaps you—or states this. That you could be treated just as well—may I say, Doctor?

WITNESS: Yes, sir.

THE COURT: —in a civilian hospital rather than the state hospital.

MR. BAXSTROM: Yes, sir.

MR. LEWIS: May it please the Court. On behalf of the institution I would also like to add that the people at Dannemora State Hospital have absolutely no objection to a transfer of any patient to a civil institution once his [fol. 38] term has expired. It is up, however, to the Department of Mental Hygiene to determine whether or not in fact these men will be transferred, and up to the transferring institution. Or in other words, the institution to which he might be transferred. We have been able to effect such transfers in many cases and I assume his case will be given every consideration for this transfer.

THE COURT: Well, you then, Mr. Lewis, will advise the authorities what the Doctor has stated on that subject. And also, I feel that if he should be in a civilian hospital, and if it can be done under the circumstances it should be done.

MR. LEWIS: Yes, sir, I certainly will.

MR. BAXSTROM: All right. Thank you.

[Stenographer's Certificate to foregoing transcript omitted in printing.]

[fol. 39] At a Regular Term of the Supreme Court held in and for the County of Clinton at Supreme Court Chambers in the City of Plattsburgh, New York, On the 3rd day of May 1962

PRESENT: HON. MICHAEL SWEENEY, JUSTICE

* * * *

PEOPLE OF THE STATE OF NEW YORK EX REL

JOHN K. BAXSTROM, RELATOR

-against-

W. C. JOHNSTON, M.D., Director, Dannemora State Hospital, Dannemora, New York, RESPONDENT

ORDER DISMISSING WRIT OF HABEAS CORPUS—filed and entered May 8, 1962.

Upon reading and filing the Relator's Petition for a Writ of Habeas Corpus sworn to the 13th day of March, 1962 the Writ of Habeas Corpus issued thereon by the Hon. Robert G. Main, Supreme Court Justice, on the 16 day of March, 1962, and the return thereto dated the 29 day of March, 1962, and the matter having been set down for a hearing on the 3rd day of May, 1962, and the matter having been heard on the 3 day of May, 1962, and the Court having heretofore appointed Dr. Ian M. Kerr a psychiatrist, to examine and report to the Court as to the mental condition of the said Relator, and the original certificate of committment herein having been exhibited to the Court and upon all of the previous process, papers, pleadings, proceedings and testimony had and taken herein and after hearing the Relator in person in support of said Writ, and the testimony of Dr. Ian M. Kerr and Charles H. Lewis, Assistant Attorney General of the State of New York, in opposition thereto and due deliberation having been had thereon,

[fol. 40] NOW, on the motion of Louis J. Lefkowitz, Attorney General of the State of New York (Charles H.

Lewis, Assistant Attorney General, of counsel), attorney for the Respondent, it is

ORDERED, that said Writ of Habeas Corpus be and the same hereby is dismissed and the Relator be and he hereby is remanded to the custody of the Respondent at Dannemora State Hospital, Dannemora, New York.

DATED: 5/4, 1962.

ENTER:

/s/ Michael Sweeney
J. S. C.

[File Endorsement Omitted]

[fol. 41]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

State of New York
Supreme Court. Clinton County.

W-6

THE PEOPLE OF THE STATE OF NEW YORK, EX REL.

JOHNNIE K. BAXSTROM, RELATOR
vs.

DR. ROSS E. HEROLD, M.D. Acting Superintendent,
Dannemora State Hospital, Dannemora, New York
Writ of Habeas Corpus
Respondent

PETITION FOR WRIT OF HABEAS CORPUS—May 16, 1963

I Johnnie K. Baxstrom being duly sworn deposes and says that he is the above named petitution in the above action and is presently confined at the Dannemora State

Hospital as and alleged insane person after the full experation of his sentence and the above respondent of whom he is so detained by entitled matters. The petitioners detention at said hospital is by virtue of a commitment via. Attica State Prison for the conviction of the crime of assault in the second degree he was sentence out of the Monroe County Court by Hon. Clarence Henry (Judge) April 9-59 to State prison for a duration of two and one half yrs. (2½ to 3) to three the petitioner is not committed by virtue of any process or detained by law or Judge thereof nor by virtue of any final Judgement of decree [fol. 42] of a competent tribunal of Civil or Criminal Jurisdiction made in a regular or special proceeding. Therefore the purpose of this affidavit and order is to give the respondent the opportunity to show cause why the said petitioner is being confined and detained and why the said petitioner should remain in the above mentional hospital for the criminally insane where is he has fully recovered and examine by an appointed Supreme Court qualified independently establish Psychiatrist not in anyway connected with or by dept. of correction or by the dept. of the Mental Hygiene, and in the Courts 5-3-62 the independent Dr. Ivan Kerr gave his findings of the examination in which he and the Hon. Michael E. Sweeney reached this decission that the assist. Charles Lewis D.A. to transfer the petitioner to a civil institution, now if there had been any doubt in Dr. Kerr's mind or Hon. Sweeney then the petitioner is more than sure this decission would not have been made or reached. Therefore if this decission can not be act upon by Law then the petitioner's Civil rights, Veterans army rights and Constitutional rights are being defrauded and depride. The petitioner feels that he is being depride of his just liberty to society and denied promply of his freedom because of the brutal and inhuman treatment that the Dannemora State Hospital and is covered up by the D.S.H. Staff and Mental Hygiene. The petitioner is aware of his everyday surroundings and the atmosphere, comotion, irrition, brutallety, fear the aforementional hospital offers and if have too are willing to under go any mental examination by two three or more independedly Drs. not in any way connected with

the Dept. of Correction or Mental Hygiene Dept. People Ex Rel Marshall. vs. Webester 266 App. Div. 537-44. [fol. 43] 2nd, further the petitioner are presently and has full control over his so pretend mental faculties and a keen sence of the medical handling as stated before. The petitioner feels and does know that his continued confinement and detention could and would serve to prejudice his future and destroy his pride. The petitioner has his own lawyers too. Pursuant to section 1234 of the Civil Practice Act. This writ of habeas corpus is on behalf of Johnnie K. Baxstrom confined at the Dannemora State Hospital and the person of whom he is detained and confined by the aforementional Ross E. Herold the respondent. The petitioner has not been committed by any process of law held in N.Y.S. are any place in the United States.

The petitioner has not been informed of any pretence or cause for being restrained of his rightfulness and unjust liberty. The petitioner is a sane person and has served the two and one half years duration for a legal sentence therefore the illegallity of being confined and held in aforemention hospital is illegal.

The petitioner submitted a writ of habeas corpus in the Clinton County Supreme Court in the city of Plattsburgh and the Hon. Sweeney (Judge) presided that the D.A. Charles Lewis see that the petitioner be transferred to a civil institution, 5-3-62 but the Mental Hygiene Dept. Dr. Forster, Dr. Hack refuse to release the petitioner as both Staff says the petitioner is to smart for putting in Writs and the petitioner has had a brutal ruff way to go sence that writ was approved. If the [fol. 44] Mental Hygiene Dept. can as it already has over rule a Supreme Court Judge's order's and a qualified independed establish Psychiatrist then already the petitioner knows why Dannemora and the Mental Hygiene refuse to release any patient that could be helped by or discharge in good health mentally or phys to a civil institution but contunelly hold him until he looses recolection of his neutruel mind and only mostly transfer dopes thats not aware. Under the United States Constitution Federal Marshall Burke Asst. Attorney General this is kidnap-

ping and committing a Federal Crime Civilians in prison with prisoners.

The petitioner believes if the Mental Hygiene and the Staff of the aforementional hospital was rearranged then lots of the D. S. H. wouldn't be looseing their families and homes when they are aware of reality.

Case Since Civil Practice act in effect.

In general where the statement of facts in a petition for a writ of habeas corpus to inquire into the case of relators detention substantially complies with requirements of Section 1234 Subdivision 4 and 5 of the civil practice act, the petition is sufficient peo. ex. rel. Van Buren v. Superintent etc. (1922) 118 Mic. 145, 192 N.Y. Supp. 511. There it is hopeful and prayful that this writ be granted and serve a legal purpose.

/s/ Johnnie K. Baxstrom

Sworn to before me this 16 day of May, 1963.

/s/ Oren F. Henry
Notary Public

OREN F. HENRY
Notary Public in the State of New York
Residing in the County of Clinton
My Commission expires March 30, 1964

[fol. 45]

IN THE NEW YORK SUPREME COURT,
COUNTY OF CLINTON

THE PEOPLE OF THE STATE OF NEW YORK, EX REL,
JOHNNIE K. BAXSTROM, RELATOR

-against-

ROSS E. HEROLD, M.D., Director Dannemora State Hospital, Dannemora, New York, RESPONDENT

WRIT OF HABEAS CORPUS—issued June 13, 1963

THE PEOPLE OF THE STATE OF NEW YORK

TO: ROSS E. HEROLD, M.D., Director, Dannemora State Hospital.
GREETING:

WE COMMAND YOU, that you have the body of JOHNNIE K. BAXSTROM by you imprisoned and detained as it is said, together with the time and cause of said imprisonment and detention, by whatsoever name the said JOHNNIE K. BAXSTROM is called or charged, before the Honorable Harold R. Soden, Supreme Court Justice, at the Special Term of Supreme Court to be held at the Court House in the City of Plattsburgh, New York, on the 26th day of July, 1963, at 10 o'clock in the forenoon of that day, to do and receive what shall then and their be considered concerning him, and have you then and there this writ.

WITNESS: HON. HAROLD R. SODEN, Supreme Court Justice, this 13th day of June, 1963.

LET THE FOREGOING WRIT ISSUE.

/s/ Harold R. Soden
Justice of the Supreme Court

/s/ LeRoy McGee
Clerk

[SEAL]

RECEIVED
June 19, 1963
DANNEMORA STATE HOSPITAL
Medical Office

[Ad. 46]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

In the Matter of the Application of
John K. Baxstrom

Return to Writ of Habeas Corpus—June 20, 1963

The following return to a Writ of Habeas Corpus heretofore granted by the Hon. Harold R. Soden, a Justice of the Supreme Court is hereby respectfull made:

I. That Ross E. Herold, M.D. is the Director of the Dannemora State Hospital, and has the care and custody of all patients committed to that institution.

II. That at a Term of the County Court, held in and for the County of Monroe, at the Court House in the City of Rochester, State of New York, on the 23rd day of April, 1959, John K. Baxstrom, the relator in the present matter was convicted of the crime of Assault 2°—Viol. Sec. 242-4 Penal Law, and was thereupon sentenced to be imprisoned in the State Prison at Attica, New York.

III. That the said relator was received at Attica Prison on April 9, 1959 and subsequently on June 1, 1961 was duly transferred to the Dannemora State Hospital, where he is now detained. That such transfer from Attica Prison to the Dannemora State Hospital was made pursuant to Law; that the order for such transfer is now in the possession of the respondent and the respondent begs leave to refer thereto upon the argument of this Writ.

IV. That the full term of sentence of said John K. Baxstrom expired on December 18, 1961 and the patient was regularly committed to this hospital on December 6, 1961 as an insane person on the Order of the Hon. Robert S. Long, Judge of the Surrogate's Court of Clinton County, in accordance with Section 384 of the Correction Law.

V. Section 384, Paragraph 3 of the Correction Law states: "Any such patient in the Dannemora State Hospital may be transferred to any appropriate state insti-

tution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such patient by agreement between the heads of such departments."

[fol. 47] VI. This patient was examined by Dr. Richard V. Foster, Assistant Commissioner for the Department of Mental Hygiene on November 27, 1961 relative to a transfer to a Civil Hospital and was not considered to be suitable for care in a Civil Hospital.

VII. Deponent further alleges that the said John K. Baxstrom is, in his opinion, an insane person, and that he is in need of further hospital care and treatment.

VIII. That the said John K. Baxstrom is now presented before the Court in obedience to the Writ recently issued.

All of which is respectfully submitted.

Dated at Dannemora, New York, this 20th day of June, 1963.

/s/ Ross E. Herold
ROSS E. HEROLD, M.D.
Director, Dannemora State Hospital

[*Duly sworn to by Ross E. Herold, M.D. jurat omitted in printing (all in italics)*]

At a Term of the County Court, held in and for the County of Monroe, at the Court House in the City of Rochester, State of New York, on the 23rd day of April 1959

PRESENT:

Hon. Clarence J. Henry Monroe County Judge

The People of the State of New York.

vs.

John K. Hankerson

Indictment No. 118

Filed Mar. 21, 1958

The Defendant John K. Hankerson having been indicted by the Grand Jury of the County of Monroe, on the 21st day of November 58, for the crime of Assault, Second Degree §242-3 and 242-4 Penal Law and said indictment having been duly sent to this Court to be disposed of and said defendant upon said indictment having been duly convicted on the 19th day of March 19 59 by jury verdict of guilty of the crime of Assault, Second Degree in violation of [illegible]

and said defendant now appearing for judgment and being asked whether he have any legal cause to show why judgment should not be pronounced against him and said defendant [illegible]

It is Ordered and Adjudged by the Court that the said John K. Hankerson for the crime of Assault, Second Degree §242-4

aforesaid, whereof he has been convicted, be imprisoned in the State Prison at Attica, New York for an indeterminate term the minimum of which shall not be less than 2 1/2 years nor more than 5 years

as of April 9th, 1959

[illegible] Circuit Court, Baltimore [illegible] State of New York) on November 17, 1958 of Robbery, a felony in New York [illegible]

County of Monroe) ss: Files

I, [illegible], Clerk of said County, do hereby certify that I have compared the foregoing judgment with the original thereof remaining on record in this office and that the same is a true and correct transcript therefrom and of the whole of said original.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said County at Rochester, this [illegible] day of April A.D. 1959

[illegible] Clerk

39

[fol. 48]

39

STATE OF NEW YORK
MONROE COUNTY

County Court

THE PEOPLE OF THE STATE
OF NEW YORK

vs.

John K. Baxstrom

Judgment

April 23rd, 1959

THE PEOPLE OF THE STATE
OF NEW YORK

vs.

John K. Baxstrom

The records of County Jail show that defendant spent 110 days in said jail before sentence and is to be calculated as a part of sentence herein imposed.

Pursuant to Chapter 410 Laws of 1919.

Monroe County Sheriff

Dated April 23rd, 1959

RECD AT ATTICA PRISON

104

[fol. 50]

IN THE NEW YORK SUPREME COURT,
COUNTY OF CLINTON

THE PEOPLE OF THE STATE OF NEW YORK EX REL

JOHNNY BAXTROM, RELATOR

-against-

ROSS E. HEROLD, Superintendent, Dannemora State Hospital, Dannemora, New York, RESPONDENT

STENOGRAPHIC TRANSCRIPT of PROCEEDINGS

had in the above-titled Matter, at a Special Term of the Supreme Court held at the Clinton County Court House, Plattsburgh, New York, on Friday, July 26, 1963, before The HONORABLE HAROLD R. SODEN, Justice of the Supreme Court.

[fol. 51] APPEARANCES

LOUIS J. LEFKOWITZ, Attorney General of the State of New York; By: CHARLES H. LEWIS, Assistant Attorney General.

THE RELATOR, personally present.

* * * *

THE COURT: You are Johnny Baxtrom?
THE RELATOR: Yes, Sir.
THE COURT: What is your number?
THE RELATOR. 6887.
THE COURT: And you are the same person who heretofore has asked for a writ of habeas corpus, claiming that you are now sane and being illegally detained in an insane institution, is that true?
THE RELATOR: Yes, Sir.
THE COURT: And have you had an independent psychiatrist to examine you?
THE RELATOR: Yes, Sir.
THE COURT: Who was it?

THE RELATOR: Dr. Kerr, from Potsdam, New York.

THE COURT: Dr. Kerr?

[fol. 52] THE RELATOR: Yes, from Potsdam, New York.

THE COURT: All right, have a chair.

Mr. Lewis, this man isn't represented. Do you want to speak now as to what the contention is?

MR. LEWIS: Yes, Sir.

I'd like to bring to the attention of the Court the case of The People ex rel O'Melia against Johnston, 238 N.Y. Sup. 2nd, 999, which, in effect, states that there need not be an opportunity afforded for an independent psychiatrist to be appointed for the patient where this has been done and there is no change produced by the Relator, and that the court can rely upon the prior history as elicited from the physician, as in this case, Dr. Kerr, and that is pursuant to Section 226 of the Mental Hygiene Law.

THE COURT: Now, he has been heretofore examined by Dr. Carson; and Dr. Kerr, I take it, has stated that he [fol. 53] wasn't presently sane, is that correct?

MR. LEWIS: That is correct, Sir.

THE COURT: And that he was in need of further hospitalization?

MR. LEWIS: That is correct.

THE COURT: And that was when, did you say; did you happen to say when he was examined?

MR. LEWIS: I can find that date, I believe.

THE RELATOR: It was May the 27th, Sir, 1962.

THE COURT: May 27, 1962?

THE RELATOR: April, I'm sorry, it was April.

THE COURT: April 27, 1962?

MR. LEWIS: That's correct.

THE COURT: Now, Mr. Baxtrom, do you have any other testimony, in the way of a psychiatrist, that would disprove the statement of Dr. Kerr in 1962?

THE RELATOR: Well, Sir, I can read you my paper of the decision of Dr. Kerr, and also the Honorable Michael Sweeney.

[fol. 54] THE COURT: Well, I know, but I'm not going over the same hearing that we had in 1962 all over again.

The thing that I'm asking you, Sir, if you understand me, as there has been a doctor appointed, at your request, to examine, report and testify concerning your present mental condition at that time—

THE RELATOR: Yes, Sir.

THE COURT: Now, in a new case that has been handed down by the Appellate Division in April, 1963, if you cannot produce or have no means of producing to me at this time that there is any other psychiatric testimony that would differ from Dr. Kerr's, under the law I am bound by his statement.

Do you follow what I'm saying?

THE RELATOR: Yes, sir.

THE COURT: Do you understand it?

THE RELATOR: Yes, Sir.

THE COURT: I take it you have no further or other testimony to contradict Dr. Kerr, that is available to [fol. 55] you at the moment?

THE RELATOR: I'm not contradicting Dr. Kerr or Honorable Sweeney, but this decision was made May the 3rd, 1962, after my examination by Dr. Carson in Dannemora State Hospital.

THE COURT: Yes?

THE RELATOR: Dr. Kerr and Honorable Sweeney, on the 3rd day of May, 1962, reached this decision: That the Assistant D.A. here, Charles Lewis, transfer the petitioner, me, Johnny Baxtrom, to a civil institution. That has been approximately 15 months now, will be during the next month, and there hasn't been the first movement made yet, because I have checked, my sister has checked, my brother has checked, and there has been no—been nothing made toward these papers.

THE COURT: If course, that is an administrative procedure, isn't it, Mr. Lewis?

MR. LEWIS: Yes, Sir. It's not the decision of Judge [fol. 56] Sweeney that he be transferred; he said that he would recommend it, as he did in all the cases with these fellows over their terms.

THE COURT: Of course, I wouldn't have authority to do that.

THE RELATOR: Sir, I have a court order of that decision.

THE COURT: Well, I'm sure that Judge Sweeney didn't say that you were going to be taken from Dannemora State Hospital and put in a civil institution; he recommended it.

THE RELATOR: No, Sir, his decision, he and the independent psychiatrist, Dr. Kerr—

THE COURT: That you should be transferred to a civil hospital.

THE RELATOR: Yes, Sir.

THE COURT: And that is up to the administrative officials in the State of New York, and not the judicial branch. There isn't anything I can do about that.

THE RELATOR: No, Sir, I'm not saying anything about that, but what I'm saying is this: He asked the [fol. 57] Assistant Attorney General here to see that this be done, and Dr. Herold, Ross Herold.

THE COURT: Maybe they have, maybe they haven't, I don't know. Mr. Lewis has no power over that.

THE RELATOR: Well, he stood right there (indicating) under oath, and said that he would see that this be done, because he's having trouble out of my sister in Baltimore, Maryland, which is my home.

THE COURT: Anything further you wish to say, Mr. Lewis?

MR. LEWIS: No, Sir, nothing further, except that I believe—it's difficult to remember back in this particular case, but I'm sure that Judge Sweeney did say that he wished this man would be transferred to a civil institution, as do I, but I have no power nor has the Court.

THE COURT: The writ is respectfully entertained and denied, and you have an exception.

(Whereupon the proceedings in the above-titled action [fol. 58] were concluded).

* * * *

[Stenographer's Certificate to foregoing transcript omitted in printing.]

[fol. 59] At a Special Term of Supreme Court held in and for the County of Clinton at the Court House in the City of Plattsburgh on the 26th day of July, 1963.

PRESENT: HON. HAROLD R. SODEN, JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF CLINTON

Criminal # 58

THE PEOPLE OF THE STATE OF NEW YORK EX REL

JOHNNIE K. BAXTROM, RELATOR

-against-

ROSS E. HEROLD, Director, Dannemora State Hospital, Dannemora, New York, RESPONDENT

ORDER DISMISSING WRIT OF HABEAS CORPUS—dated August 2, 1963

Upon reading and filing the Relator's Petition for a Writ of Habeas Corpus dated May 16, 1963 the Writ of Habeas Corpus issued thereon by this Court dated June 13, 1963 the Return thereto dated June 20, 1963 and the matter originally having been scheduled for July 26, 1963 upon which day it was heard, and the original certificate of committment herein having been exhibited to the Court and upon all of the previous papers, process, pleadings, proceedings and testimony had and taken herein, and after hearing the Relator in person in support of said Writ and Charles H. Lewis, an Assistant Attorney General of the State of New York, in opposition thereto, and due deliberation having been had thereon.

[fol. 60] Now, on the motion of Louis J. Lefkowitz, Attorney General of the State of New York, (Charles H. Lewis, Assistant Attorney General, of counsel), attorney for Respondent, it is

ORDERED that said Writ of Habeas Corpus be and the same hereby is dismissed and the Relator, JOHNNIE K.

BAXTROM, be and he hereby is remanded to the custody of the Respondent at the Dannemora State Hospital, Dannemora, New York.

DATED: AUGUST 2, 1963.

ENTER:

/s/ Harold R. Soden
Justice of the Supreme Court

[File Endorsement omitted]

[fol. 61] At a Term of the Appellate Division of The Supreme Court, State of New York, held in and for the Third Judicial Department, at the County Court House in the City of Albany, New York, commencing on the 20th day of April, 1964.

PRESENT:

HON. JAMES GIBSON,
Justice Presiding,
HON. J. CLARENCE HERLIHY,
HON. DONALD S. TAYLOR,
HON. FELIX J. AULISI,
HON. HERBERT D. HAMM,
Associate Justices.

Criminal Index # 58

Order No. 5682

THE PEOPLE OF THE STATE OF NEW YORK EX REL.

JOHNNIE K. BAXSTROM, APPELLANT

-against-

ROSS E. HEROLD, as Director of Dannemora State Hospital, RESPONDENT

The appeal from an order denying relator's petition for a writ of *habeas corpus* having been duly brought before

this Court during the April, 1964 Term thereof and having been duly submitted by appellant and by Louis J. Lefkowitz, Attorney General of the State of New York (Anthony J. Lokot of counsel), attorney for respondent, and due deliberation having been had, and a decision having been handed down on May 22, 1964, it is

ORDERED, that the order as appealed from be and the same is hereby unanimously affirmed, without costs. No opinion.

/s/ John J. O'Brien
Clerk

[SEAL]

ENTERED: July 15, 1964

A TRUE COPY

/s/ John J. O'Brien
Clerk

FILED
July 21, 1964
CLINTON COUNTY
CLERK'S OFFICE
HALSEY J. STARK, Clerk

[fol. 62]

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of October A.D. 1964.

PRESENT, HON. CHARLES S. DESMOND, *Chief judge, presiding.*

Mo. No. 693

THE PEOPLE &c. EX REL. JOHNNIE K. BAXSTROM, APPELLANT

vs.

DR. ROSS E. HEROLD, Director, Dannemora State Hospital, Dannemora, New York, RESPONDENT

A motion for leave to appeal to the Court of Appeals &c. in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

* * * *

[fol. 63]

SUPREME COURT OF THE UNITED STATES

No. 838 Misc., October Term, 1964

JOHNNIE K. BAXSTROM, PETITIONER

v.

R. E. HEROLD, Director, Dannemora State Hospital

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 7, 1965

On petition for writ of Certiorari to the Court of Appeals of the State of New Yorkk.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1246 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 787145 189

PETITION NOT PRINTED
RESPONSE NOT PRINTED

FILED
NOV 1 2 1965
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 219

JOHNNIE K. BAXSTROM,

Petitioner,

vs.

R. E. HEROLD, Director, Dannemora State Hospital,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AND APPENDIX FOR PETITIONER

LEON B. POLSKY
The Legal Aid Society
Counsel for Petitioner
100 Centre Street
New York City, New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 219

JOHNNIE K. BAXSTROM,

Petitioner,

vs.

R. E. HEROLD, Director, Dannemora State Hospital,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

Opinions Below

No opinions were rendered by the courts below.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3). The writ of certiorari to the New York Court of Appeals was granted on June 7, 1965.

Constitutional Provisions and Statutes Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 375, 383, 384 and 385 of the New York Correction Law. These provisions are reprinted as Appendix E, *infra.*

Questions Presented

I

Whether due process of law requires a proposed patient be afforded the opportunity to obtain counsel to represent him at an insanity commitment hearing and whether the due process and equal protection clauses require the assignment of counsel to represent an unrepresented proposed patient in such a proceeding.

II

Whether a state which affords all proposed civil patients a jury trial upon the question of sanity may withhold this right from felons whose commitment is sought upon the expiration of sentence.

III

Whether a state may confine one class of civil patients in an institution for the criminally insane without a particularized showing of need for such care and custody.

Statement of the Case

Petitioner was convicted in Rochester, New York, of Assault in the Second Degree and, on April 23, 1959, was sentenced to two and one-half to three years imprisonment (R. 39). After serving two years and several months in Attica State Prison, the Petitioner was "transferred" to Dannemora State Hospital pursuant to Section 383 of the Correction Law (R. 17).

The Commitment

In November 1961, the Director of Dannemora State Hospital filed a petition in the Surrogates' Court of Clinton County stating that Petitioner's penal sentence was about to terminate and requesting the certification and commitment of the Petitioner pursuant to Section 384 of the Correction Law, alleging:

> "This patient was admitted here on June 1, 1961 from Attica Prison. He is suffering from epilepsy and when having fits, he is violent and dangerous. He has had several epileptic seizures since his admission and he is still in need of medication and hospitalization. His diagnosis is Psychosis due to convulsive disorder, Epileptic Deterioration" (R. 2).

Annexed to the Petition was the joint certificate of two doctors, unconnected with Dannemora stating that Mr. Baxstrom lacked insight, "possibly" had a "tendency" to injure others (R. 5) and that following his epileptic convulsions he was "irritable, confused [and] aggressive" (R. 4).

Notice that a commitment proceeding was to be held on December 6, 1961 was served upon two relatives of the Petitioner who lived in Maryland (R. 8, 9) and upon the Petitioner himself (R. 10). It does not appear that the Petitioner or his relatives were served with a copy of the Director's application for commitment.

On December 6, 1961 Baxstrom appeared before the Surrogate of Clinton County. Present were Surrogate Long, Doctor Ross Herold, then the Assistant Director of Dannemora, and Assistant Attorney General Lewis.

The Court advised Mr. Baxstrom that it had read the certificates of the two independent doctors and that they were of the opinion that he was still mentally ill. The Court advised that it would hear the testimony of Dr. Herold and then would allow Baxstrom to question either the doctor, Mr. Lewis or make any statement he cared to regarding the matter. Mr. Lewis then interrogated Dr. Herold, eliciting the doctor's qualifications and the opinion that the Petitioner was mentally ill and in need of institutional care with a diagnosis of psychosis due to epileptic deterioration (R. 15-16). In response to questions from the Court, Dr. Herold stated that he would have no objection to the Petitioner's transfer to a civil hospital if the Department of Mental Hygiene ordered it. The Court stated that it too had no objection to a transfer to a civil hospital and told Baxstrom that it hoped he would be transferred (R. 17, 18).

Mr. Baxstrom was asked by Surrogate Long whether he had anything to say and the Petitioner replied:

> "I know that I am an epileptic, but I did not think that that is a form of insanity. I would like to recommend, Sir, that the staff at the hospital review my case" (R. 17).

At no point in the hearing was the Petitioner advised that he could be represented by counsel, either retained or assigned, or that he might subpoena or call witnesses on his own behalf.

On December 6th, Surrogate Long signed an order committing the Petitioner to the custody of the Commissioner of Mental Hygiene,

"... to be placed in an appropriate state institution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such person by agreement between the heads of the two departments" (R. 12).

The First Writ

Four months after this commitment the Petitioner sued out a writ of habeas corpus in Supreme Court, Clinton County (R. 19-32). The Director's Return on the Writ recited the history of the prior proceedings and stated that Petitioner was then insane and had been examined on November 27, 1961 by an Assistant Commissioner for the Department of Mental Hygiene and "was not considered to be suitable for care in a Civil Hospital" (R. 21). At a preliminary hearing on the Writ, Justice Sweeney directed Petitioner be examined by an independent psychiatrist and the hearing was adjourned. On May 3, 1962 a hearing was held before Justice Sweeney.

Dr. Ian Kerr testified that he had examined the Petitioner and found him suffering from psychosis with epilepsy and was of the opinion that there was some organic deterioration of the brain. He testified that according to the hospital records, Mr. Baxstrom,

"... becomes quite confused and quite aggressive and assaultive during the post-convulsive period, and this, of course, is not an uncommon happening in cases of epilepsy" (R. 27).

The doctor found that the Petitioner's epilepsy could have been caused either by malaria or a specific infection con-

tracted by Petitioner in 1945 while in the Army and stationed in the Pacific (R. 28).

The doctor also related, but did not comment on the fact that Mr. Baxstrom had told him during the examination that the disturbances and irritations caused by the other inmates at Dannemora tended to bring on the epileptic attacks (R. 26, 28-29).

At the conclusion of the hearing the doctor, in response to a question by the Court, stated that Mr. Baxstrom needed additional care but added,

> " . . . I would like to say that in my opinion there is no reason why he could not be treated in a civil mental hospital. I would simply like to say that for the record, sir" (R. 29).

Assistant Attorney General Lewis then stated,

> "On behalf of the institution I would like to add that the people at Dannemora State Hospital have absolutely no objection to the transfer of any patient to a civil hospital once his term has expired. It is up, however, to the Department of Mental Hygiene to determine whether or not in fact these men will be transferred • • • " (R. 30).

The hearing concluded with the Court's direction to Mr. Lewis that the authorities be advised of Dr. Kerr's recommendation in which the Court joined (R. 30).

On the following day (May 4, 1962), Judge Sweeney signed the order dismissing the Writ (R. 31-32).

The Proceedings Below

On May 16, 1963, one year after the dismissal by Judge Sweeney, Petitioner submitted to the Supreme Court of Clinton County an application for a new writ of habeas corpus claiming that he was then sane, or if insane should be transferred to a civil mental hospital and that his civil and constitutional rights had been violated. The Writ was issued and the Respondent, Dr. Herold, filed his return reciting the December 6, 1961 commitment, that Petitioner was still insane and in need of further hospital care and treatment and that Mr. Baxstrom had been examined on November 27, 1961 by an Assistant Commissioner of the Department of Mental Hygiene and "was not considered to be suitable for care in a Civil Hospital" (R. 38).

A hearing was held before Justice Harold Soden on July 26, 1963. At the hearing Assistant Attorney General Lewis opposed the appointment of a new independent psychiatrist claiming that the burden was on Petitioner to show that his condition had changed since Dr. Kerr's testimony that Petitioner was in need of hospitalization and that until Petitioner made such a showing the Court could rely upon Dr. Kerr's testimony on the prior Writ. Justice Soden asked Petitioner,

> " . . . do you have any other testimony, in the way of a psychiatrist, that would disprove the statements of Dr. Kerr in 1962?"
>
> • • • • •
>
> " . . . if you cannot produce or have no means of producing to me at this time that there is any other psychiatric testimony that would differ from Dr. Kerr's, under the law I am bound by his statement" (R. 42, 43).

Petitioner indicated he had no additional testimony but claimed that Judge Sweeney, after hearing Dr. Kerr, had directed Mr. Lewis to have Petitioner transferred to a civil institution and that nothing had been done. Judge Soden said that this was an administrative matter and that there was nothing his court could do about it. The Writ was dismissed by order dated August 2, 1963 (R. 45-46).

Upon appeal to the Appellate Division of the Supreme Court, Third Judicial Department, the dismissal of the Writ was affirmed without opinion (21 A. D. 2d 754). A motion for leave to appeal to the Court of Appeals was denied without opinion (14 N. Y. 2d 490) and this Court granted leave to proceed *in forma pauperis* and the petition for a Writ of Certiorari (381 U. S. 949).

Introduction

New York State maintains twenty-one non-transient institutions for the care of the mentally ill. These institutions are under the exclusive jurisdiction of the Department of Mental Hygiene and commitment to and matters connected with these hospitals are regulated by the Mental Hygiene Law. In addition the State maintains two other institutions: Matteawan State Hospital and Dannemora State Hospital. These institutions are under the jurisdiction of the Department of Correction, although individual patients may be in the custody of the Commissioner of Mental Hygiene. See, *Mental Hygiene Law*, §11. Admission to these institutions is governed by various sections of the Correction Law, the Code of Criminal Procedure and the Mental Hygiene Law set forth below.

Dannemora State Hospital

Dannemora is a State hospital for the insane maintained at a penal institution.[1] It is under the jurisdiction and control of the Department of Correction, subject to visitation and inspection by the Department of Mental Hygiene. *Correction Law,* §375. Its population is composed of three classes of individuals:

1. Male persons, in the custody of the Commissioner of Corrections, who were found to be insane while serving felony sentences and were committed or transferred pursuant to Section 383 of the Correction Law.

2. Male persons, in the custody of the Commissioner of Corrections, who after having been adjudicated to be a juvenile delinquent or having been convicted of any crime were found, while serving their sentences, to be "mental defectives" and transferred to the Eastern Correctional Institute and while there were found to be insane. *Correction Law,* §383 (see N. Y. Legislative Annual, 1950, p. 51).

3. Male persons transferred to Dannemora under either of the above classifications who upon expiration of sentence were committed to the custody of the Commissioner of Mental Hygiene under *Correction Law,* §384.

Matteawan State Hospital

Like Dannemora, Matteawan is a mental institution under the jurisdiction and control of the Department of Correction and subject to visitation and inspection by the Department

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[1] *People ex rel. Brown* v. *Johnston,* 9 N. Y. 2d 482 at 484 (1961); *People ex rel. Kamisaroff* v. *Johnston,* 13 N. Y. 2d 66, 68 (1963).

of Mental Hygiene. Basically its purpose is to hold in custody and care for persons committed by other than civil process and certain civilly committed patients. *Correction Law,* §400. Its population is composed of five classes of persons:

1. Persons charged with crime who have been judicially found to be mentally incapable of standing trial (*Code of Criminal Procedure,* §§662(b), 872 and 875). Prior to September 1, 1965 such persons were committed to the custody of the Commissioner of Corrections. All commitments after that date were to the Commissioner of Mental Hygiene. Laws of 1965, c. 540, §§1, 2, 3.

2. Persons declared insane while serving a misdemeanor sentence or females declared insane while serving any sentence. *Correction Law,* §§400, 408.

3. Persons acquitted by reason of insanity. *Code of Criminal Procedure,* §454.

4. Persons who had previously been committed by civil process to a state mental hospital and while there have committed or are liable to commit acts which would constitute homicide or felonious assault; or a person so dangerously mentally ill that he is a danger to other inmates, officers of the hospital or the community. *Mental Hygiene Law,* §85.

5. Persons who were committed by civil process to a state mental hospital and who (1) had previously been sentenced to imprisonment and (2) still manifest criminal tendencies. Laws of 1904, c. 525, §2 (*Correction Law,* §412). This law was repealed by Laws of 1965, c. 105, §11; however, there apparently is no provision for the transfer out of those inmates previously committed.

Under New York law, both at the time of Petitioner's commitment and at present, all defendants in non-emergency commitment proceedings instituted under the Mental Hygiene Law were at some point in the proceeding entitled to a jury trial on the issue of sanity. Laws of 1961, c. 504 as amended by Laws of 1964, c. 738, §6 (*infra*, p. 67). This provision is inapplicable to commitments to Dannemora State Hospital under *Correction Law*, §384 and to the transfers, listed above, of persons otherwise in custody to Dannemora and Matteawan. See *People ex rel. Kamisaroff* v. *Johnston*, 13 N. Y. 2d 66 (1963).

POINT I

The commitment and continued detention of petitioner are in violation of his rights under the Fourteenth Amendment because of the failure to afford petitioner counsel at the hearing upon his sanity.

A. *The General Need for Counsel*

It is perhaps assumed that counsel at commitment proceedings can perform no real function at the hearing, or at best, will perform only the therapeutic function of demonstrating to a patient that there was someone who is on his side. This assumption is based upon the further assumption that commitment proceedings, upon doctor's certificates of insanity, are instituted only against the "obviously mad" and there is nothing further to be done except go through the formal gesture of getting some evidence upon the record and signing a commitment order. Both assumptions are demonstrably false.

Random samplings of Legal Aid and Public Defender offices throughout the country dramatically illustrate how

defendants in commitment proceedings have successfully resisted commitment in almost 20% of the cases where counsel was assigned (see, Appendix B). Furthermore just as representation of a guilty defendant at sentence is required so that the court may make a just disposition of a criminal defendant (cf., *Carter* v. *Illinois*, 329 U. S. 173, 178), so is representation at commitment of concededly insane persons required to enable the court to arrive at a just and proper commitment. Even if it may be assumed that there is no legal difference between commitment to one state mental institution or another, certainly there exist factual differences between certain institutions (see p. 23, *infra*) and counsel may perform the necessary and legitimate function of having the commitment reflect the need for a particular type of institutionalization or even out-patient care without confinement. This need is best reflected by the annexed report (Appendix C) of the Public Defender of Philadelphia who represents felony prisoners in post-sentence expiry commitment proceedings.[2]

This need for counsel has been confirmed by the legislatures of an overwhelming majority of the states by their enactment of statutes providing for representation at commitment hearings—in some cases the statutes even antedating the state's guarantee of counsel in non-capital felony cases (see Appendix A).

In the State of Ohio, Governor Di Salle reported in 1961 (Appendix D, p. 61, *infra*) that 25% of the patients in

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[2] This representation is financed by a grant from the National Legal Aid and Defender Association. It does not extend to representation of defendants in ordinary civil commitments. No provision is made for the representation of such persons in Pennsylvania. (See Appendix A, p. 38 *infra*.)

his state's mental hospitals were persons over 65 years and that approximately one-half of these patients were not mentally ill in the commonly accepted sense. He stated that after his investigation 1,500 such patients were discharged and that the total discharges might reach 3,000. One may well wonder how these 3,000 persons initially came to be committed and how long they would have remained in the asylums had not the Governor intervened in their behalf. We do not know how many of these persons had counsel at their commitments nor do we know how many of those persons with counsel who successfully resisted commitment would have been committed if unrepresented.[3] We offer these figures only to show that a substantial number of legally sane persons are in fact committed and that an even more substantial number find themselves as defendants in commitment proceedings.

Apart from all this, however, the need for counsel in this type of proceeding is an obvious truth needing no documentation. Putting aside the rare case of malicious commitment there will always be some kernel of truth to a claim that a particular respondent or defendant is "not normal." The issue in almost every contested commitment is how close does the proposed patient come to the elusive line which divides the sane from the committable. Such a person, even if falling upon the "sane" side of the scale, is probably the one least capable of asserting his sanity. Cer-

[3] Assignment of counsel in Ohio is discretionary. We are advised by the Legal Aid Society of Cincinnati that it appears "in very few commitment cases"; the Defender's Office of the Cleveland Legal Aid Society handled five civil commitment cases in the first nine months of this year and the Legal Aid and Defender Society of Columbus appeared in ten such proceedings during this period. Of the fifteen persons represented by assigned counsel in Cleveland and Columbus, eight were committed, six were not and one escaped before disposition.

tainly such a person is no match for an Assistant Attorney General who has probably handled hundreds of commitment proceedings and such a person could hardly be expected to effectively cross-examine a court-wise director of a large mental institution or to cross-examine absent certifying doctors.

We may allow New York to continue its uniform policy of non-assignment of counsel only if we are prepared to assume the infallibility of the certifying doctors[4] and that the judicial process is merely a rubber stamp upon the ineffectually contested opinions of expert witnesses. Such assumption may be validly made only if the defendant's sanity may be conclusively presumed from the mere fact that a commitment proceeding was instituted. Such assumptions and presumptions run counter to a thousand years of history.

B. *Petitioner's Need for Counsel*

The proceedings had before the Surrogate of Clinton County clearly reflect the need for counsel, both as to the question of Petitioner's sanity and the disposition to be made.

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[4] The notion that "insanity" is a determination solely for the doctors rests upon the false premise that mental illness may be scientifically measured and that the experts proceed upon uniform, precise standards which result in opinions equivalent in accuracy to the opinions of fingerprint experts. We need only look at the conflicting expert testimony in any criminal case where insanity is tendered as a defense to see the fallacy of this argument.

The basic question in commitment proceedings is not whether a patient is insane (whatever that may mean) but is whether a person's mental capacity is such that his continued liberty is a potential danger to himself or the community. This is not a medical judgment. It is a social judgment based upon contemporary community standards of what is or is not acceptable conduct. See, *Is Counsel Needed at Commitment Hearings?—A Symposium*, 23 Legal Aid Briefcase 13-18 (Oct. 1964).

New York law (Correction Law, §384) requires that the certification be upon the certificates of two doctors unconnected with the hospital. The certificates filed at the commitment proceeding before the Surrogate reflected that Mr. Baxstrom, as a "psychiatric sign and symptom", lacked insight (R. 5, l. 108); that following his epileptic seizures, he was "irritable, confused, [and] aggressive" (R. 4, l. 104) and that he "possibly" showed a "tendency" to injure others (R. 5, l. 115).

This diagnosis and prognosis of Mr. Baxstrom's illness is equally applicable to the two million epileptics in the United States. Whether cross-examination of the certifying doctors would have shown the Petitioner "insane" or "sane" is a matter for conjecture. The fact remains that the doctors were not even present and there was no one in court who could have demanded their presence on Petitioner's behalf.[5] In this connection it is noteworthy that Dr. Kerr, the psychiatrist who examined Petitioner five months after the commitment, volunteered in his testimony at the first post-commitment habeas corpus hearing, that "there is no reason why he could not be treated in a civil mental hospital" (R. 29). Presumably such testimony was related to Petitioner's alleged tendency to be possibly dangerous and is in direct conflict with the assumed administrative finding by the Assistant Commissioner of Mental Hygiene that the Petitioner "was not suitable" for transfer to a civil hospital.

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[5] See, *State ex rel. Anderson* v. *U. S. Veterans Hospital*, 268 Minn. 213, 128 N. W. 2d 710 (1964); *Denton* v. *Commonwealth*, 383 S. W. 2d 681 (Ky., 1964) holding the reliance upon the certificates of the absent doctors and the failure to allow for their cross-examination to be a denial of due process. *Cf.*, *Pointer* v. *Texas*, 380 U. S. 163 (1965).

Even if the Petitioner were in fact insane the Surrogate, who concluded the hearing with the hope that Petitioner would be transferred to a civil hospital, could have refused to commit the Petitioner under Section 384 and required the State to proceed under the Mental Hygiene Law rather than the Correction Law. If such a procedure had been followed then the Petitioner at such a commitment proceeding would have been entitled to a jury trial on the question of his sanity and if committed could have been sent only to the civil hospital where everyone, except the Commissioner of Mental Hygiene, seemed to agree he belonged.[6]

C. *The Right to Counsel*

Every jurisdiction provides for some form of hearing and judicial review or determination of the sanity of those patients who wish to contest their commitment.[7] The right to a hearing and the opportunity to be heard in a meaningful manner is a fundamental requirement of due process whether the case be civil, criminal or somewhere in between. *Armstrong* v. *Manzo*, 380 U. S. 545 (1965). Without counsel to implement this right the commitment hearing becomes nothing more than a hollow gesture and the luck-

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[6] If the Petitioner had been so committed he could be transferred to Matteawan only upon showing that in addition to being insane, there was a particular danger to others if he was allowed to remain in a civil hospital. *Mental Hygiene Law*, §85; *Correction Law*, §412 (repealed). See Point III, *infra*.

[7] We cannot help but note that in many jurisdictions this right is an illusory one for it depends upon someone, usually the doctors, advising a patient of his rights. See, Hearings before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, *Constitutional Rights of the Mentally Ill*, Part I, Eighty-seventh Congress, First Session (1961) (hereafter *Senate Hearings*), Ross testimony, p. 185; Guttmacher testimony, p. 148; Chasan testimony, p. 228.

less defendant is packed away to custody "probably little less punitive than a sentence of death." *Ex parte Perry,* 137 N. J. Equity 161, 43 A. 2d 885, 886 (1945).

It is one of the great anomalies of constitutional law that the arguments for the absolute right to counsel in criminal cases reach back for historic support to the much older right to counsel in civil litigations. Thus both Justice Blackstone (4 Blackstone, *Commentaries,* *355) and this Court in *Powell* v. *Alabama,* 287 U. S. 45 (1932), relied upon the common law tradition of civil representation to support the claimed right to assignment in criminal cases.

As Professor Maguire has pointed out the Year Books and the reports of the Selden Society are replete with notations of the granting of *in forma pauperis* type relief and the assignment of counsel to represent indigent civil litigants in the Fourteenth and early Fifteenth Centuries. Maguire, *Poverty and Civil Litigation,* 36 Harv. L. Rev. 361 (1923).

In 1495 the first extensive *forma pauperis* statute was passed. 11 Hen. VII, c. 12; 2 Stat. of the Realm, 578. It provided:

> ". . . every pouer persone or persones which have & hereafter shall have cause of accion or accions ayenst any persone or persones within the realme shall have, by the discrecion of the Chauncellor of this realme, for the tyme being writte or writtes originall and writtes of Sub pena according to the nature of their causes, therfor nothing paieng to youre Highnes for the seales of the same, nor to any persone for the making of the same writte & writtes to be hereafter used. And that the seid Chaunceller for the same tyme being shall assigne suche of the Clerkis whiche shall doo and use

> the making and writing of the same writtes to write the same redy to be sealed, and also lerned Councell and attorneyes for the same, without any rewarde taking therfor . . . "

See also, 3 Blackstone *400-401.

The right to counsel in commitment proceedings is even more fundamental than the general right to counsel in other civil litigation.[8] As this Court noted in *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, at 276-77:

> "We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings."

The argument will undoubtedly be advanced that the State was acting for the benefit of Petitioner and other members of the community by placing him in a mental institution. Such a contention really only relates to the Government's

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[8] Louisiana has made just such a distinction, but in reverse. In a proceeding to appoint an administrator of the property of a person alleged to be incapable of managing his affairs, the Supreme Court of Louisiana held that any judgment was void if counsel was not appointed. *Interdiction of Scurto*, 195 La. 747, 197 So. 417. However, eight years later the same court held that notice and hearing was not required in a commitment. *In Re Bryant*, 214 La. 573, 38 So. 2d 248 (1948). We reject as intolerable the distinction which gives greater value to property rights than to liberty.

power to commit, not to the means by which the commitment is effectuated. The observation by Mr. Justice Brandeis that, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent"[9] is particularly appropriate here. At all of his hearings the Petitioner received sympathetic attention from the judges presiding and the other persons present. Concededly the State was acting out of motives which generally may be classified as parental or charitable. But this sympathy, courtesy and good intentions relate to the therapeutic aspect of the hearing and commitment, not to the legal question of whether an individual is committable. This question is to be ultimately resolved in the same manner as are all other questions involving the liberty and property rights of persons. Whether the Petitioner's conduct and condition fell outside those minimum standards of mental responsibility tolerable to society can be determined with sympathy and understanding, but also with justice.

The State of New York has labeled this commitment a "civil" proceeding and because of this characterization, denies Petitioner an attorney.[10] We think the accuracy of this label is debatable in all civil commitments to any mental institutions; however, in terms of a commitment to Dannemora, the civil tag is utterly without basis. At Dannemora the Petitioner is mingled with convicted felons

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[9] *Olmstead* v. *United States*, 277 U. S. 438, 479 (dissenting opinion).

[10] The New York Attorney General, two months prior to Petitioner's commitment, responded to an enquiry from one of the judges of Clinton County that a Section 384 commitment is a civil proceeding and, ". . . it is not necessary to so advise an inmate [of his right to retain counsel] but if that inmate indicates that he desires counsel an opportunity should be given to him to hire counsel." 1961 Op. Atty. Gen. N. Y. 180, 181.

serving out their sentence in a hospital located upon prison grounds and operated under prison discipline. And by virtue of his custody in Dannemora Petitioner must bear a stigma even more onerous than that of a criminal prisoner. *People ex rel. Brown* v. *Johnson,* 9 N. Y. 2d 482. All that has happened to justify the civil label is that one day the Petitioner was taken from Dannemora and brought before a judge who returned him from whence he came, although now in some abstract sense, in the custody of the Commissioner of Mental Hygiene.

Fundamental fairness as an aspect of due process of law is not limited to proceedings strictly called criminal. *Smith* v. *Bennett,* 365 U. S. 708 (1961); *cf., One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 393 (1965).

Those criminal cases involving the right to counsel which rest upon a fundamental fairness test are ample authority for the proposition that the due process requirement of a fair hearing in civil proceedings includes the right to appear by counsel and to have counsel appointed in cases where personal liberty is at stake.

POINT II

Section 384 of the Correction Law is unconstitutional in that it arbitrarily singles out one group of allegedly mentally ill persons and denies to that group the jury trial to which all other civilly committed patients are entitled.

Under New York law[11] all proposed civil patients are entitled to a jury review of the question of their sanity. Only persons who allegedly became insane and whose insanity was discovered during service of a criminal sentence are refused a jury trial on this question. While New York may be under no constitutional obligation to provide a jury trial in any of its civil commitments, having made it generally available to all it may not arbitrarily withhold it from some. Each year New York admits approximately 30,000 persons to its civil mental hospitals.[12] However only the 487 inmates in Dannemora who are held under Section 384 commitments are never given the opportunity to demand the jury trial which all other civil patients could demand incident to their commitment.

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[11] Jury trials existed in pre-Revolutionary New York for the purpose of "informing the conscience of the court." By Chapter 135 of the Laws of 1842 a jury review was made a matter of right in every civil commitment proceeding. *Sporza* v. *German Savings Bank*, 192 N. Y. 8 (1908). The substance of this statute has remained unchanged and at the time of Petitioner's commitment appeared in Laws of 1961, c. 504 (McKinney's *Mental Hygiene Law*, §76). At present the jury trial provision is a part of the Laws of 1964, c. 738, §6 (McKinney's *Mental Hygiene Law*, §74). See Appendix E, p. 67 *infra*.

[12] This figure includes temporary commitments, voluntary patients, involuntary patients and transfers. *Patients in Mental Institutions*, 1963, Public Health Svc. Pub. No. 1222, Part II, p. II-17.

The sole factor which distinguishes Petitioner from the other civil patients for whom a jury trial is available is that Petitioner's commitment follows the expiration of a criminal sentence and an administrative determination of insanity made during the service of that sentence. Neither of these factors is sufficient to warrant the discriminatory treatment afforded.

Clearly New York could not withhold a jury trial on the issue of sanity only from ex-felons for that status bares no rational relationship to the question of sanity. *Walters* v. *City of St. Louis,* 347 U. S. 231, 237 (1954); *Goesaert* v. *Cleary,* 335 U. S. 464, 466 (1948). Indeed New York seems to have recognized this by not even including past criminal convictions in any of the stated criteria for the transfer of committed patients to Matteawan.[13]

The fact that there has been prior administrative determination that Petitioner was insane stands upon an even more tenuous footing as a basis for denying a jury trial. In every case where a jury trial is available there has been not only an administrative determination of insanity but there has also been a judicial determination. The New York jury trial is a *de novo* rehearing of a judicial certification of insanity, in most cases involving patients already being held by a mental hospital on a temporary or informal admission.

While we concede that there may be a legitimate basis for distinguishing between the "civilly insane" and the

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[13] Under former Section 412 of the Correction Law a prior conviction *plus* manifestation of criminal tendencies would warrant a transfer of a civil patient to Matteawan. This Section was repealed in 1965. See, *United States ex rel. Carroll* v. *McNeil,* 294 F. 2d 117 (2nd Cir., 1961), probable jurisdiction noted, 368 U. S. 951, vacated and dismissed as moot, 369 U. S. 149 (1962).

"criminally insane" in determining the type of custodial or medical care to be ultimately given, no such distinction can be drawn when we are considering the procedure whereby the fact in issue, the sanity of the proposed patient, is to be determined.

POINT III

Petitioner's commitment and retention in Dannemora State Hospital under Section 384 of the Correction Law violates the equal protection and due process clauses of the Constitution in that the statute arbitrarily singles out one group of mentally ill persons and permits their confinement in an institution for the criminally insane without the necessity of a judicial finding that such confinement is necessary.

Dannemore State Hospital is an institution maintained by the Department of Correction of the State of New York on the grounds of Clinton State Prison. Over one-half its inmates are prisoners serving felony sentences.[14] While in Dannemora the Petitioner is subject to the prison discipline which applies to all inmates whether serving a sentence or not. Even the social amenities granted to inmates in civil hospitals are denied to Petitioner. He may not wear his own clothes; he may not correspond freely with friends or persons not approved by the Commissioner of Correction (*Correction Law,* Section 388); his visitors must be fingerprinted; and the prison number (#6887) given to Petitioner upon his transfer into Dannemora as a prisoner

[14] As of September 1965 the population of Dannemora was:

1.	Held under section 383	560
2.	Held under section 384	487
3.	Transfers from Eastern Corr. Inst.	13

remains his number which must appear upon all his correspondence as a civil patient. If the Petitioner is no longer a "prisoner" in Dannemora the State has done little to make Petitioner aware of this fact. Indeed the Legislature of the State of New York has by deliberate act set Dannemora and Matteawan apart from all other mental hospitals in the state system. See, *United States ex rel. Carroll* v. *McNeil,* 294 F. 2d 117 (2nd Cir.), probable jurisdiction noted, 368 U. S. 951, appeal dismissed as moot, 369 U. S. 149 (1962). It has done this by placing these institutions under the jurisdiction of the Department of Correction and, in the act creating Dannemora designated it as a place "... used for the purpose of confining and caring for such male prisoners as are declared insane while confined in a state prison ..." (Correction Law, Section 375).

We have acknowledged that a state may discriminate in the kinds of care and custody afforded to individual inmates. Particularly, a state may segregate within its hospital system those persons whose mental illness poses an especial danger to the hospital staff, fellow patients, or to the person's own well being and safety. However the State has, in the instance of Section 384 patients, gone too far.

Not only has New York provided for confinement outside of its hospital system but it has done so at the expense of the procedural safeguards discussed in Point II and without establishing any criteria or standards which would distinguish Petitioner's class from other proposed civil patients.

Under New York law only three classes of civil patients are amenable to confinement in the institutions maintained by the Department of Correction: (1) the patient already

committed by civil process to a civil hospital who after a separate judicial proceeding is found to be homicidal or liable to commit acts which would constitute felonious assault or who is so mentally ill that he is a danger to others (*Mental Hygiene Law,* Section 85); (2) those patients already committed by civil process who are ex-felons and who continue to exhibit criminal propensities (former *Correction Law,* Section 412; see, *United States ex rel. Carroll* v. *McNeil, supra,* holding part of this statute to be unconstitutional); and lastly, those persons situated as was Petitioner.[15]

In each instance where the transfer of a civil patient to an institution of the Department of Correction is sought, the State has the burden of showing that the inmate, in addition to his insanity, belongs to a class of mentally ill persons for whom stricter security is necessary. However when the post sentence expiry commitment of a Dannemora prisoner is sought, no finding need be made other than that the prisoner-patient is insane. It even appears that a Section 384 commitment may be made in spite of the fact that the evidence adduced shows " . . . there was no reason why [Petitioner] could not be treated in a civil hospital" (*supra,* p. 6).

The statute under which the Petitioner was committed and is confined sets him apart from all other civil patients in both a physical sense and a procedural sense. Because of this classification which is neither rationally based nor uniformly applied, Petitioner has been deprived of rights

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[15] We may exclude from consideration those commitments to Matteawan which flow from the criminal process as different considerations of policy may be involved (see, *Lynch* v. *Overholser,* 369 U. S. 705, 715-717). In any event, such persons must have counsel. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

upon which all others have a claim. The statute challenged here is subject to every vice found present in the sterilization statute considered by this Court in *Skinner* v. *Oklahoma,* 316 U. S. 534 (1942) and is deserving of the same fate.

CONCLUSION

For the foregoing reasons the orders appealed from should be vacated and the case remitted with directions to sustain the writ of habeas corpus.

Respectfully submitted,

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APPENDIX A

State Law Relating to the Right to Counsel at Commitment Hearings

ALABAMA—Code of Ala., Tit. 21, §10:

"If, on the hearing of such inquisition, the person alleged to be of unsound mind is not represented by counsel the court shall appoint a guardian ad litem to represent and defend for him." See, *Smith* v. *Smith*, 254 Ala. 404, 48 So. 2d 546 (1950). See also, Title 21, §15.

ALASKA—Alaska Statutes, Title 47, Chapter 30, Section 070 (h) [47.30.070h]:

"An opportunity to be represented by counsel or advisor shall be given to the proposed patient, and if neither he nor others provide counsel or advisor, the superior court shall appoint a counsel or advisor * * * "

ARIZONA—Title 36 Revised Statutes, §514A:

"At the time of apprehension or during detention, but before the hearing, the proposed patient apprehended shall be permitted to consult an attorney to represent him at the hearing. If he is not represented by an attorney, the court shall, before the hearing, appoint an attorney to represent him."

ARKANSAS—

No provision relating to counsel.

CALIFORNIA—Welfare and Institutions Code, §5054:

"The alleged mentally ill person shall be present at the hearing, and if he has no attorney, the judge may appoint an attorney to represent him, or if a request is made for an attorney by the alleged mentally ill person the judge shall appoint an attorney to represent him . . . " See, *In re People for Best Interest and Protection of Campbell,* 12 Cal. Rptr. 60, 190 C. A. 2d 253.

COLORADO—Colorado Revised Statutes, 1963. Chapter 71 Article 1, §8:

"The court shall appoint an attorney at law who shall represent the respondent as his guardian ad litem in all proceedings thereunder. The guardian ad litem shall be given at least two days notice of the time and place of the first meeting of the medical commission and shall attend all meetings of the medical commission . . . "

CONNECTICUT—General Statutes (Revision of 1958), Title 17, Section 178, as amended by Public Act 199 (1963):

"Upon such complaint being filed in the probate court such court shall assign a time, not later than ten days thereafter, and place for hearing such complaint, and shall cause reasonable notice thereof to be given to the person alleged to be mentally ill . . . If such court is satisfied that such person is a dangerous person to be at large, it may make such order for his restraint and custody while the proceedings are pending as it deems advisable; but such person shall not be prevented from having all reasonable opportunities to consult counsel and friends and to prepare and make his defense to such application • • • "

DELAWARE—Revised Code, 1953, Chapter 51; 16 Delaware Code Annotated, §5101-5523. See also, Chancery Court Rules, 100-108:

No provision relating to counsel.

See, *Senate Hearings,* Testimony of Hon. John Biggs, Jr., pp. 127-129.

DISTRICT OF COLUMBIA—78 Stat. 944, §7 (d); D. C. Code, §21-356 (d):

"The allegedly mentally ill person shall be represented by counsel . . . and if he fails or refuses to obtain counsel, the court shall appoint counsel to represent him."

FLORIDA—Title 27, Chapter 394, §22 (4), 394.24 (4), Florida Statutes:

" * * * The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence. An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court may appoint counsel."

Title 27, Chapter 394, §22 (7):

"b. At any stage of the proceeding the judge may, upon the application of any alleged incompetent who is indigent, appoint an attorney to represent said person . . . "

GEORGIA—Georgia Health Code, Acts of 1964, pp. 449, 534; Code of Georgia Annotated, Chapter 88, Section 506 (1964 Supp.):

"(d) • • • Provided, however, that in the event the allegedly mentally ill person shall be financially unable to employ counsel to represent said person in said hearing, then the [court of] ordinary shall appoint an attorney to represent said person • • • "

HAWAII—Revised Laws of Hawaii, 1955 (1963 Supp.), Chapter 81, §19-21:

No provision relating to counsel in the original court commitment. However upon what is apparently a *de novo* review by an "appeals commission,"

"The appeals commission shall hear and determine all cases brought before it on appeal. Upon such appeal the appellant shall have the right to be represented by counsel and to produce witnesses and to offer appropriate evidence for the person on whose behalf the appeal is prosecuted." Ch. 81, §40. See also, Ch. 14A, §§32, 34.

IDAHO—Idaho Code, 66-329 (g):

" • • • An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel and authorize a proper fee to be paid such counsel from the county funds."

ILLINOIS—Chapter 91-½, Section 8-22.1, Illinois Revised Statutes (as amended by Laws of 1965, June 9):

"(a) If the court determines that the person alleged to be mentally retarded or to be in need of medical treatment is indigent, the court shall appoint as counsel the public defender . . . "

Chapter 91-½, Section 7-2 (as amended by Laws of 1965):

"The magistrate or judicial officer shall identify himself and his official position and in simple, non-technical language and in a language known to the patient, shall explain to the patient the patient's rights under this Act, including that the patient shall have a hearing on the question of his need for medical treatment if he shall indicate his desire for a hearing and that at such hearing the patient will be represented by counsel and shall have the right to present evidence and cross-examine witnesses."

INDIANA—Acts of 1957, Chapter 359, Section 602 p. 1046; Burns Indiana Stat. Anno., §22-1216:

" * * * Unless the individual whose mental status is being inquired into has employed other counsel, the prosecuting attorney of the county of the allegedly mentally ill person's residence shall appear and represent such person in said proceedings."

IOWA—Acts of 1959 (G. A.) Ch. 152, §98; Iowa Code Annotated, Title 11, Ch. 229.5:

"Appearance on behalf of such alleged mentally ill person may be made by any citizen of the county, or by any relative, either in person or by counsel.

If at said hearing such person appears without counsel or appearance is made in his behalf without counsel, the commission, before proceeding further, shall inform such person or persons appearing for him of his right to legal counsel, then if no counsel is employed, the district court shall assign him counsel."

See also, 1948 Op. Atty. Gen. 67.

KANSAS—Laws of 1965, Ch. 348, Section 14:

"*Mandatory preliminary orders; procedure.* Upon the filing of the application provided for in section 13, the probate court shall issue the following:

(A) • • •

(B) • • •

(C) An order appointing an attorney to represent the 'proposed patient' at all stages of the proceedings • • • The 'proposed patient' shall have the right to engage an attorney of his own choice and, in such event, the attorney appointed herein shall be relieved of all duties by the court."

KENTUCKY—Kentucky Revised Stat. (1959) §202.050:

"In each inquest the court shall appoint a member of the bar to represent the interests of the defendant, and the attorney for the Commonwealth also shall prevent the finding of any person to be of unsound mind who, in his opinion, is not such."

LOUISIANA—Revised Statutes of 1950, Title 28, Sections 53-62:

No provision relating to counsel in sections relating to commitment. However Section 141, relating to the costs of the commitment provides:

"If financially able, the patient or his legally responsible relative shall pay the costs of commitment, including examination fees, expenses incurred in calling witnesses, fees of counsel for the patient, and fees of the commission, otherwise the parish of domicile in the case of a resident or the department in the case of a non-resident shall pay these costs."

MAINE—Revised Statutes, 1964, Title 34, §2334:

"• • • An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel • • • "

MARYLAND—Code of Maryland, Article 59:

No specific statutory provision.

See, *State ex rel. Adams* v. *May,* 196 Md. 152, 75 A. 2d 839, at 842:

"• • • The Attorney General informs us that in at least one county the court appoints counsel for the alleged insane person and has the testimony reported by a court stenographer. We think the statute at least authorizes this procedure."

MASSACHUSETTS—General Laws, Chapter 123, §51:

"• • • Upon receipt of an application for commitment the court shall cause written notice to be personally served upon the person named therein, informing the said person of the application for commitment and of his right to a hearing at which he can be present and be represented by counsel • • • "

MICHIGAN—Compiled Laws of Michigan, 1948, §330.21:

"* * * The court to whom the petition is directed may dispense with such personal service or may direct substituted service to be made upon some person to be designated by it * * * In such cases the court shall appoint a guardian ad litem to represent such mentally diseased person upon such hearing, and in other cases it may appoint a guardian ad litem * * * "

See, *In re Wojtasiak,* 375 Mich. 540, 134 N. W. 2d 741 (1965) which seems to hold that there is a constitutional right to counsel in proceedings to recommit a felon in a post-sentence expiry case.

MINNESOTA—Laws of 1963, ch. 258, §2; M. S. A., §525.751 (4):

"* * * If the patient so requests or is held for observation under order of the court, the court shall appoint counsel for him, if he is financially unable to obtain counsel. In all other cases the court may appoint counsel for the patient if it determines the interests of the patient requires counsel."

See, *State ex rel. Anderson* v. *U. S. Veterans Hospital,* 268 Minn. 213, 128 N. W. 2d 710 (1964).

MISSISSIPPI—Miss. Code Anno., §6909-07, 08:

No provision relating to counsel.

MISSOURI—Vernon's Annotated Missouri Statutes, §202.807 (4):

"The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure . . . An opportunity to be represented by counsel

shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel."

MONTANA—No provision relating to counsel.

NEBRASKA—Laws of 1947, c. 335, §16, p. 1061; Rev'd. Statutes of 1943, §83-325:

"• • • Any citizen of the county or any relative of the person alleged to be mentally ill, may appear and resist the application; the parties may appear by counsel."

See *Senate Hearings,* Testimony of Dr. C. H. Farrell, p. 163 to the effect that the Public Defender represents all defendants requesting counsel.

Session Laws of 1963, ch. 524:

"Medical Care for Drug Users

• • •

(2) The alleged drug-using person, referred to in sub-section (1) of this section shall be represented by counsel. If the court determines that he is financially unable to obtain counsel, it shall appoint counsel for him • • • "

NEVADA—Revised Statutes §433.200:

"(1) • • • The judge may direct the clerk of the court to issue subpoenas for the attendance of witnesses at the examination of the person, assign counsel to defend such person . . . and enter such other orders as he may consider necessary to permit a proper determination concerning the mental condition of, and to protect the rights of the person alleged to be mentally ill."

NEW HAMPSHIRE—See generally N. H. Rev'd. Stat. (1964), Chapter 135.
No provision relating to counsel.

NEW JERSEY—Laws of 1919, c. 97, §20, p. 234; N. J. S. A. 30:4-41:

"In all cases where the patient is confined in an institution before the final hearing, the county adjuster shall serve or cause to be served personally upon the patient a written notice of the time and place of final hearing and shall give notice to the plaintiff and the patient's nearest relative. The chief executive officer [of the institution] shall afford the patient every opportunity to appear personally or by attorney at the hearing, and assist him in communicating with his friends, relatives or attorney * * *"

See *Senate Hearings,* Testimony Chasen, at pp. 226-27:

"* * * I assume that he [the proposed patient] would probably find the bar in our State responsive were a request made for counsel. * * *

But I have never, in over 30 years of practice, heard of an application being made . . . except where large amounts of money are involved . . . very rarely is there an actual adversary proceeding."

NEW MEXICO—Laws of 1953, ch. 182, §5; N. Mex. Stats. Anno., §34-2-5:

"f. * * * An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel."

North Carolina—See generally, General Stats., §122-64 and 65:

No statutory provision relating to counsel.

Cf., *In re Wilson*, 257 N. C. 593, 126 S. E. 2d 489 (1962).

North Dakota—S. L. 1957, ch. 196, §3; R. C. 1943, 1957 Supp., §25-0311 (6); N. D. Century Code, §25-03-11 (6):

"• • • An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the mental health board, upon request of the proposed patient, shall appoint counsel. If it is determined that the proposed patient is unable to pay for such counsel, the attorney [sic] fees, upon approval of the mental health board shall be paid by the county."

Ohio—Baldwin's Ohio Revised Code, §5122.15 (1964):

"• • • The individual named [as defendant] in the affidavit shall be notified by the court of his right to secure counsel. The court may appoint, at any time in the proceedings, an attorney to represent a person who is alleged to be mentally ill • • •"

Oklahoma—See generally, Laws of 1953, §55, p. 163, as amended; 43A Okla. St. Ann., §55:

No provision relating to counsel.

Oregon—O. R. S. 426.100:

"If the allegedly mentally ill person, when brought before the court, requests the assistance of counsel to

represent him at the proceedings provided for by O. R. S. 426.070 to 426.150, the court shall give such person opportunity to obtain such legal counsel. If no such request is made by the allegedly mentally ill person, his legal guardian, relative or friend may, in the order named, request assistance of legal counsel. If no request for legal counsel is made by any party, the court may, at its discretion, appoint legal counsel. In all cases such legal counsel shall be present at the hearing and examination and may examine all witnesses offering testimony, and otherwise represent such person."

PENNSYLVANIA—See generally, P. L. 533, art. III, §327 (June 12, 1951) as amended; 50 P. S. §§1201-1203:

No provision relating to counsel other than 50 P. S. 1202 (c) which provides:

"The commission shall hear such evidence as may be offered or they may require, relating to the mental condition of the person sought to be committed, as well as, his or his counsel's statement * * *"

RHODE ISLAND—Gen. Laws 1956, 26-2-13; G. L. 1938, ch. 71, §7; General Laws of Rhode Island, Annotated (1956), §26-2-13:

"In all cases, whenever a person is apprehended and held for examination upon the question of his or her sanity before any court or commission authorized by this chapter to hear such question, and such person is by reason of poverty unable to employ counsel . . .

The court or commission before whom any such hearing shall be had shall forthwith, upon the apprehension of such person, appoint counsel to make the defense provided for in §26-2-11 * * *"

South Carolina—Code of Laws, 1962, §32-962:

"* * * An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel for him."

South Dakota—Laws of 1953, ch. 178; Laws of 1959, ch. 174; Code of 1939, §30.0107:

"* * * In its examination, it [the board] shall hear the testimony for and against such application, if any is offered . . . The person charged with being mentally ill or any citizens of the county or any relative of the person alleged to be mentally ill may appear and resist the application, and any person authorized to appear may appear with counsel * * *"

Tennessee—Acts of 1919, ch. 17, §10; T. C. A., §33-508:

"The county judge or chairman shall proceed with the hearing to determine whether the person in question is insane or not. Before proceeding, however, the court shall appoint a guardian ad litem to look after the interest of the person in question, but said guardian ad litem need not be, but may be, an attorney at law, but he shall be present at the hearing and manage the case in behalf of the person suspected."

TEXAS—Acts of 1957, ch. 243, §43; Vernon's Annotated Texas Statutes, 5547-43:

"When a Petition and the required Certificate of Medical Examination for Mental Illness are filed, the county judge shall set a date for a hearing to be held within thirty (30) days of the filing of the Petition, and shall appoint an attorney ad litem to represent the proposed patient."

UTAH—Laws of 1963, ch. 160, §1; Utah Code Anno., §64-7-36G:

"* * * An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel the court shall appoint counsel."

VERMONT—Laws of 1959, No. 185; 18 Vt. Stat. Anno., §2602:

"In any proceeding before a county, municipal or probate court involving the involuntary commitment of an alleged insane person to a mental institution, such person, or any resident or non-resident guardian or next friend or relative of such person, acting for such person, shall be afforded counsel, and if the alleged insane person is unable to pay for same, compensation shall be paid by the state to counsel assigned by the court . . ."

VIRGINIA—Laws of 1958, c. 595; Code of Virginia, §37-62:

"In any proceeding for commitment under this title, the judge upon whose warrant such proceeding is being held shall ascertain if the person whose commitment is sought is represented by counsel. If such person is

not represented by counsel such judge shall appoint an attorney at law to represent such person in such proceeding * * *"

WASHINGTON—Laws of 1959, ch. 25; RCWA, §70.02.190:

"If no guardian of the person has been appointed, the court may appoint a guardian ad litem to represent the patient during proceedings. The person filed against shall have the right to be represented by an attorney if requested."

See, *State ex rel. Richey* v. *Superior Court,* 59 Wash. 872, 371 P. 2d 51 (1962).

WEST VIRGINIA—Acts of 1965, ch. 98; W. Va. Code of 1961 (1965 Supp.), §2661:

"* * * The mental hygiene commission shall appoint a guardian ad litem who shall be a competent attorney, for the individual, and said guardian shall be present at the hearing and protect the interests of the individual * * *"

WISCONSIN—West's Wisconsin Statutes Annotated, Title 7, §51.02 (4):

"At any stage in the proceedings, the court may, if it determines that the best interest of the patient requires it, appoint a guardian ad litem for him."

WYOMING—Laws of 1963, ch. 188, §12; Wyoming Stat., §25-60 (d):

"... If the court has reason to believe that notice would be likely to be injurious to the proposed patient, and so finds in its order for notice, notice to him may

be omitted, but in such case notice shall be given to legal counsel appointed by the court to represent the proposed patient if no relatives, spouse or guardian reside within the county * * * In addition the notice shall apprise the person of the purpose of the proceeding . . . the identity of legal counsel appointed by the court to represent the proposed patient and the latter's right to counsel of his own selection . . . "

APPENDIX B

CASES HANDLED BY LEGAL AID OR DEFENDER AGENCIES

Agency	Period Covered	Cases Handled	Committed	Not Committed
Mass. Defender's Committee, Worcester County	7/1/63–6/30/65	6	5	1
Public Defender, San Francisco	7/1/64–6/30/65	101	61	40
Atlanta Legal Aid Society	†	10	3	7
Public Defender Cook County, Ill.	12/1/63–11/30/64	6,174	5,223	951
Legal Aid Agency, D. Col.	1964	639	416	223
Public Defender, Benton County, Wash.	2/1/65–9/15/65	7	7	0

APPENDIX C

DEFENDER ASSOCIATION OF PHILADELPHIA
SUITE 800 DEWEY BUILDING
PHILADELPHIA, PENNSYLVANIA

DEFENDER'S REPORT FOR THE MONTH OF MAY

June 4, 1965

Lunacy Commission Hearings

Aided by the grant from the National Defender Project, the Association is supplying counsel to sentenced clients whom the prison authorities claim are mentally ill and committable to a state hospital for mental diseases. Representation follows the filing of a petition for a lunacy commission and the appointment of such a commission to examine the prisoner and report whether the prisoner is mentally ill or mentally defective and, if so, whether he is of criminal tendency. If a prisoner is found to be mentally ill or defective and of criminal tendency, the commission recommends commitment to Farview State Hospital for the Criminally Insane. On the other hand, if the prisoner is found to be mentally ill or defective without criminal tendency, the commission recommends that he be committed to an ordinary state mental hospital.

Our attorneys have appeared at lunacy commission hearings for the last six months. During that period, it has become increasingly clear that our services in this area are vitally needed for the protection of clients who become the subject of lunacy proceedings. The scope, nature and value of our services are illustrated in the following reports submitted by Association lawyers who appeared at lunacy hearings:

1. November 30, 1964

Lunacy Commission Hearing: Frank W

On November 24, 1964, a lunacy commission was convened to examine Frank W, an inmate at the State Correctional Institution, 21st and Fairmount Avenue, Philadelphia. The Commission, which met at the prison where the inmate was incarcerated, was composed of Frank A. Bove, M.D.; Horace J. Prescod, M.D.; and Richard H. Knox, Esq. Following is a report of the proceedings:

Prior to meeting with the Commission, I interviewed the inmate for an hour and a half. He was suspicious of me because he felt everyone was attempting to send him to Farview. He realized that his sentence would be served in a year and he felt that the officials were attempting to detain him in any way possible. I showed him my credentials and assured him that I was there to protect his rights before the Commission. Having won his confidence, I proceeded to get him to tell me his story, all of which he would retell to the Commission later that day.

The Commission met at 1:30 P.M. It commenced the proceedings by questioning the prison psychiatrist who had examined the inmate and whose report on the mental condition of the inmate is part of the findings submitted to the Court. This report was made on the basis of one interview of an hour's duration and was admittedly very inconclusive because of lack of observation of the inmate. The discussion with the psychiatrist preceded the interview of the inmate by the Commission and was held out of the presence of the inmate.

The interview with the inmate lasted over two hours, the inmate doing over 95 percent of the talking. He retold the story of his trial and of how his lawyer did a very

poor job (his major complaint was that the woman he was accused of raping had lived with him for ten years and that he had photographic proof of this, in addition to witnesses to testify to this, but that the lawyer proceeded to trial without the witnesses and photographs. This is borne out by the record but the defendant agreed at the commencement of his trial, according to the record, to proceed without this testimony necessary to his defense.) He related that he had been promoted in almost all his work assignments in prison and cited all his skills and accomplishments while working in prison. At almost all points of his narration however, he implied he was persecuted by others and this is how he accounts for serving over nine years of a four to ten-year sentence.

He concluded his interview by telling the Commission of his recent invention which would allow an airplane to land safely if it lost all of its power while in flight. He noted he did not have a working model of this device for lack of equipment. He refused to give details of this device to the Commission, except for a drawing of an airplane with numbers placed at various spots around the plane. This refusal stemmed from his feeling that if he gives information to anyone except a potential investor, he will be left out of the development of the device. He wrote a letter to the F. B. I. to inform them of this invention, and in censoring the mail, the prison authorities came across the letter. This letter was apparently one of the prime reasons motivating prison officials to initiate proceedings to determine whether the inmate needed treatment at a mental institution.

After the Commission concluded its interview, the prisoner left and I reiterated to him how the decision of the Com-

mission is reached. I then went before the Commission and advanced my opinion to them, namely, that I felt the inmate was in need of medical treatment but that he was not a violent person and definitely would be harmed by an institution like Farview. I recommended that he be sent to an institution which does not have maximum security, like Norristown. At this time, I requested a copy of the Commission report which will be filed with the Court.

It seems to me that our vital service in this area is counselling the Commission in the different natures of the institutions to which an inmate can be committed. To do this well, we must be familiar with the institutions themselves, their facilities and what type of persons they will accept. At the same time, it is necessary to interview the inmate before the hearing to apprise him of the nature of the proceedings, to calm his anxieties about being "sent away", and to aid him in communicating his story to the Commission.

MARTIN K. MILLER

2. December 9, 1964

Lunacy Commission Hearing: William R

Commission consisting of Manuel Sall, M.D., psychiatrist, Richard J. Chodoff, M.D., and John A. Geisz, Esq., met at 1:10 PM, this day, at the Eastern State Penitentiary with a prison psychologist, Mr. Wadell, and the Defender present and interviewed the prisoner, William R, for about 40 minutes, and as a result of the interview, recommended that the prisoner required psychiatric treatment, was a prime object for treatment at a mental hospital, and did not require incarceration at a maximum security institution, such as Farview, and that he was not dangerous to society but only to himself.

As Defender, I asked Dr. Sall, psychiatrist to explain the commission proceedings to the prisoner and then I introduced myself as the defender and determined that he understood the proceedings and that he desired the presence of the counsel of the Defender, and that he desired to be sent to a mental hospital for treatment. At that point, I stood mute and allowed two or three questions at the close, and remarking after the prisoner left, that hopefully he could be transferred to a low security mental institution, since that was his desire.

The prisoner appeared to this defender to merit the diagnosis and recommendations of the commission. He was guilt ridden, talked about hearing his deceased father's voice suggesting suicide to him, about being uninterested in social contact or activities, admitted hating the voice and figure of authority, i.e., cops, guards, which the good doctor diagnosed as an identification with his hatred of his father. The doctor said he was not having a true hallucination but relating his own thoughts through this medium.

Since psychiatric questioning is a method of carefully suggesting answers and attempting to elicit the prisoner's true behavior, the only way we can serve the defendant's wishes, is to be qualified in the same methods. I feel that when the commission is not agreeable to the prisoner's desires for or against transfer, I would have been at a loss to either intelligently cross-examine in order to demonstrate more or less of the prisoner's behavior or to argue psychologic theory calculated to persuade the commission with the prisoner's desires.

MICHAEL HILLEGASS

3. December 16, 1964

Lunacy Commission Hearing: Michael C

On December 2, 1964, a lunacy commission was convened to examine Michael C, an inmate at Holmesburg Prison, serving a sentence for burglary, larceny, and receiving stolen goods (11½ to 23 months.) C had 70 days time until the expiration of the minimum sentence. The commission was composed of Laurent B. Houle, M.D., Thomas B. Force, M.D., and John B. Hannum, Esquire, and had been appointed by Judge Griffiths upon petition of the prison warden (the prison psychiatrist had made the recommendation.) Prior to the hearing, I spoke with C. I informed him of the nature of the hearing and the power of the commission. I stated that he could confide any special concerns or feelings in me. Speaking coherently, though nervously, he said that he knew he needed some mental treatment; he had had treatment in a Kentucky hospital for the use of drugs and had found it helpful; he had rejected the suggestion of our office at the time of trial in June 1964 that he be committed to a mental institution in lieu of sentence and now thought he had been unwise; he was concerned, however, that he not be sent to Farview because he knew of two persons who had returned from Farview with obvious welts and bruises from beatings; he would accept a commitment beyond the 70 days remaining time for his minimum sentence at Holmesburg. Questioned about his prison experience, he stated that he preferred to be in "OBS" which he explained was "observation" because it was quiet, and when he had been returned to the cell block, [another prisoner] beat him up; therefore, to escape the harassment on the cell block, he slit his wrists for the sole purpose of being returned to OBS.

The commission met at 6:15 p.m. at the prison. The prison psychiatrist was not called (as in the case of Frank W), the commission relying solely on written reports. Furthermore, the hearing—which lasted about a half hour—consisted simply of a talk with the defendant. After members of the commission had finished questioning the defendant, I elicited the information he had confided to me because I felt it would help him. In particular, I had him tell the commission of his fear of Farview and preference of Byberry or Norristown hospitals. After the interview with C, I simply stated to the commission that I felt it would be inappropriate to find C had criminal tendencies (which would result in his commitment to Farview.) Although neither of the two doctors on the commission were psychiatrists, I felt that any objection of a legal nature should not be made in the presence of C and I made none.

The commission submitted its report to Judge Griffiths (Form MH 46-3-63) containing the following:

1) finding that C *is* in need of care in a mental institution for the following reason: "that he is in such condition as to require observation, diagnosis and treatment" (as opposed to finding him either mentally "ill" or mentally "defective"); &

2) opinion that C *is not* of criminal tendency.

On December 7, 1964, Judge Griffiths approved the report and signed an order committing C to Philadelphia State Hospital at Byberry until further order of court or until otherwise dischargeable under the provisions of section 348(b) of the Mental Health Act of 1951, as amended. This office was given the statutory ten days to object.

4. January 14, 1965

Lunacy Commission Hearing: Thomas A. C

On January 14, 1965 at 8:30 AM at the County Prison, Holmesburg, Pa. a lunacy commission was convened to examine and evaluate Thomas Augustus C. Present were the following:

James P. Ramsey, M.D.
Paul Sloane, M.D.
Hardy Williams, Esq.
Eugene V. Alessandroni, II, Esq.
Defender Association of Phila.

Before the inmate was brought into the room, Dr. Sloane read the reports prepared by the prison psychiatrist and the prison warden. These reports stated the inmate's prison behavior. In essence they were as follows:

> The inmate was a model prisoner for the first two years of his incarceration. His trouble began approximately seven months ago. Since then he has been in and out of the OBS and maximum supervision blocks. He set fire to bedding, destroyed furniture, threatened the Prison nurse and guards with violence, assaulted fellow inmates, slashed the outer portion of his arm, and had a hypodermic needle and syringe in his possession. He has been on medication and was on medication at the time of the Commission's meeting. Parole was denied in April 1965. This decision is to be reconsidered in 1965.

Inmate was then brought into the room. He appeared to be calm and collected and gave no outward signs of insanity or mental problems. He was introduced to all the Board

members and I explained the purpose of my being at the meeting.

The members of the board then took over and asked the inmate many questions about his prior behavior. C answered all the questions and was quite polite and well aware of what was going on.

He stated that he would have moods and that he was capable of violence at these times. He does not want to hurt anyone and does not want to be hurt himself. He stated that most of his misbehavior was planned and that he did these acts so that he would be transferred to a State Penitentiary. He explained that he had applied for a transfer on at least two prior occasions and that he had been turned down without a reason being given. He feels that he would be happier in the penitentiary. His knowledge of the penitentiary has been gathered from talking with other inmates. He was asked if he would want to go to a hospital and he said that it might not be a bad idea because he would like to find out why he has the moods which seem to cause some of his problems.

After the inmate left the room, we all discussed the case and it was decided that this man should be sent to Norristown State Hospital and that on his release he could be sent to the penitentiary if that was desirable in light of any findings at Norristown.

EUGENE V. ALESSANDRONI

5. January 15, 1965

Lunacy Commission Hearing: Carmen S

This took place at Graterford in the presence of Lewis S. Cali, Esquire and Drs. William A. Harvey and John B. McNally.

Dr. Harvey conducted most of the hearing. The defendant presented a very pitiful appearance. He had been, since the middle of November, in a state of mental stress consisting of delusions and hallucinations. He had broken windows in his cell, flooded it, torn sheets and blankets. He inflicted superficial wounds on himself, has refused to eat, speaks of hearing voices. Had taken some medication and refused others and from time to time refused to eat, stating that this was dictated to him by voices he heard. Dr. Harvey and Mr. Cali had prior to the hearing interviewed the step-mother of the defendant in the waiting room and she stated that she wanted no part of him. However, after the hearing she spoke to me and intimated that she was suspicious of star chamber proceedings. I tried to assure her of the fact that I had been present to protect his interest but I am afraid I did not succeed too well. At the conclusion of the hearing I suggested to Dr. Harvey that I did not like some of the wording of the findings, particularly that the defendant was of criminal tendencies. He agreed with me that the findings should indicate that the defendant, if well, would not be inherently criminal or of criminal tendencies but that his illness made him so. I suggested that such a finding be incorporated in the form that was furnished by the Quarter Sessions Court. In my own mind there is no question but that this man is at the present time incapable of normal action. His thinking is disconnected, his memory poor and confused and he has unquestionable persecutory and depressed hallucinations. He spoke constantly of hearing voices which dictated actions that were harmful to him, such as not eating in order to starve to death, pour cold water over himself in order to freeze himself to death and hot water in order to scald himself.

ISAAC PEPP

6. January 28, 1965

Lunacy Commission Hearing: Robert, J

Held at State Correctional Institution at Philadelphia
Present: Mr. DiCintio and Dr. Lehman of Commission

Dr. Cole of Commission not present
Mr. Woodell of Prison
Mr. Isaac Pepp for Defendant

Mr. Woodell of prison gave history of defendant's behavior.

He was persecuted by all actions of prison authorities. All rules were directed against him personally, would not eat at times—suspicious that food was not proper on religious grounds (Defendant is a Muslim).

Defendant will not talk to white persons and only to such negroes as are Muslims.

Defendant was placed in "Hole" for talking in ugly manner to the Warden regarding his food.

Defendant refused to appear before Commission. We adjourned to before the cell of defendant. He refused to talk to anyone.

I tried to introduce myself to defendant as representing him. He imperiously ordered me to leave.

NOTE: This defendant incarcerated for parole violation

Basis: refused to work

ISAAC PEPP

7. February 16, 1965

Lunacy Commission Hearing: Earl X. B

On January 6, 1965 a Lunacy Commission was convened to examine Earl B, an inmate at Holmesburg Prison, who had

been under observation there since shortly after his arrest for vagrancy, disorderly conduct and resisting arrest. The Commission was composed of Kenneth K. Kool, M.D., a psychiatrist, Myron A. Zacks, M.D. whom I learned specialized in ear, nose and throat medicine and Edward Dicker, Esq.

Before the hearing I had interviewed Mr. B at his cell at Holmesburg Prison. It seems that he had been taken to the Detention Center where he had immediately gone on a fast in accordance with his beliefs as a member of the Black Muslim movement. He was transferred to Holmesburg for observation and had been lying in his cell with a shirt over his head for hours at a time. He hated white men and was being handled only by Negro personnel. For this reason, the authorities would only let me talk to him in his cell. At his cell I had a stormy interview with Mr. B who kept reiterating his Muslim beliefs and arguing that he had done nothing and ought to be let out. I somehow managed to get through to him the fact that the lunacy commission was about to sit to consider his mental competency. The interview ended inclusively when I was informed that the Commission had called for Mr. B's appearance before it.

When I next saw Mr. B he was escorted to the hearing room by two Negro prison guards who remained outside within view of the chair in which Mr. B was seated. He had changed from the ranting vindictive man I had met at the cell into a quite, reasonable person who responded very well to the questions of the commission. Dr. Kool, the psychiatrist, did most of the questioning.

It appeared that the defendant aged 30 had become a Muslim about 5 years earlier. He had only completed eight grades of education and had spent most of his boyhood working on truck farms in New Jersey. He had served

satisfactorily in the army for three years, and worked steadily as a construction worker or window washer. He does not know the whereabouts of his parents or his brothers of sisters, and is, in every sense, a "loner" except for his fanatical attachment to the Muslim movement.

Before his arrest, he had crossed Market Street at 30th. A white man, whom defendant apparently knew, had called him back on the theory, as defendant put it, that he was afraid to come back and face him. Defendant went back at which point he claimed the white man hit him with a club in the head. Defendant hit the man only after being struck himself in the head.

His defense to the resisting-arrest charge was that he had not done it because he had been arrested by a Negro officer and that one of the tenets of his faith was that he will accept any authority imposed upon him by a "Black Brother". Defendant stated that he would only use force in self defense, and that he had no fear of death. Although he has spent a good deal of time proselytizing on behalf of the Muslim movement, including selling the newspapers of Elijah Muhammid, he stated that he realized that beliefs could not be forced upon people.

Defendant testified that he had no visions or hallucinations and, in response to my question on "cross examination", brought out the fact that the man that he follows on earth is Elijah Muhammid, a living person, who resides in Chicago and occasionally visits Philadelphia. I stressed this for the reason that I thought at least two members of the panel might think that the mention of the name Elijah indicated that defendant was speaking of a supernatural person. I also brought out the fact that defendant had only one prior arrest for resisting arrest so as to dispel any possibility of the commission's finding that the defendant's

mental state resulted in criminal tendencies so as to cause him to be sent to Farview Hospital for treatment.

In response to the question of another member of the panel, defendant answered perfectly the question of what he would do with an envelope that he found on the street addressed to someone else in which he could see a $10 bill.

Although I had fears of the hostility of at least two members of the panel to the Muslim views asserted by the defendant, I was pleased to learn from the head of the panel that the group unanimously voted in favor of reporting to the Quarter Sessions' Court that Mr. B was not in need of any treatment.

SAMUEL T. SWANSEN

8. March 5, 1965

Lunacy Commission Hearing: Alvey Edward C

I attended hearing during my weekly visit to Graterford on March 5, 1965. Interviewed defendant before hearing.

Attended briefing by Clayton of Prison concerning actions of defendant that led to their asking for a commission. He indicated that at present time the defendant seemed to be in remission and did not appear to be psychotic.

I gave the Commission my impression of the defendant and hastily reviewed the cause of his incarceration.

The defendant was brought in and questioned. He gave good account of himself, was lucid, coherent and precise in his language. He expressed contrition of his acts and hoped to be able to make a go of things.

The Commission came to the conclusion that defendant was not committable and should "be kept under observation and treatment". Such a finding will be filed. There will be no finding of "criminal tendencies". Concern of possible re-

mission was expressed. Possibility of better treatment at 21st Street was suggested as a result of prodding by me but was only mentioned as it was "an administrative decision" and not the proper subject of a finding by the commission.

I had in the file a report from Norristown on this defendant and Mr. Clayton referred to the possibility of the defendant being there but that he did not have any confirmation or report from that institution. I had gone over this report with the defendant earlier and made it available to the Commission.

Query: Should I have done this?

Forgot the most important part: The defendant was very happy to know his interests would be looked after.

ISAAC PEPP

9. May 7, 1965

Lunacy Commission Hearing: Larry M

The Commission consisted of Laurent B. Houle, M.D., Edward B. Polin, M.D., and Raymond L. McConemy, Jr., Esq. Also present were Dr. Harvey Levine, Resident Psychiatrist of Philadelphia General Hospital, and Miss Ellen Rice, Staff nurse. The hearing was heard on the eighth floor of Mills Building of Philadelphia General Hospital.

I arrived an hour and one half before the scheduled hearing and conferred with Dr. Levine and the defendant.

Dr. Levine informed me that I would be able to get little help from Mr. M, hereafter referred to as the "patient". The patient was apparently born retarded and when younger suffered a form of epilepsy which subsequently produced some brain damage. The patient is approximately twenty-eight years of age, but his actual birth date is un-

known because of his inability to answer questions. He was apparently sentenced on a charge of indecent exposure from a 1962 bill of indictment and has been in several prisons since that time. The patient was unable to furnish any information as to where he has been or as to the details of his crime. He was brought to Philadelphia General Hospital from Holmesburg Prison on March 27, 1965 with a statement from the prison that he was confused, uncontrollable and severely psychotic. Dr. Levine informed me that he was unable to establish communication with the patient, whose brain damage is apparently permanent, but that he did not think the patient had either violent or criminal tendencies.

I attempted to speak with the patient who presented a very pitiful sight. He sat in a chair mumbling, apparently understood some of my questions, but his answers were not very lucid.

The patient appeared before the Commission and in answer to questions of the doctors, convinced them that he was nonviolent and did not harbor criminal tendencies. The patient sat quietly in a chair, mumbling, and made little sense other than to state that he had no hallucinations, liked everybody and was happy where he was.

The patient's parents also appeared and expressed an interest in seeing their boy frequently. The parents are very slow, and are apparently unaware that their boy was, as a youth, mentally retarded.

Dr. Levine stated to the Commission that the patient frequently had his fly unzipped at Philadelphia General Hospital, and he assumes that it is because the patient knows no better. It is probable that this was how his "crime" was committed.

It was apparent to the doctors on the Commission that the patient was not a criminal. They felt he was mentally deficient and functioning at the lowest possible level of a human being. There is no hope for his recovery as the brain damage appears permanent. However, he seems to be well adjusted to Philadelphia General Hospital, and the Commission felt that since he is not violent, has no criminal tendencies, and that his parents wish to visit him often, that the best interest of the patient and the Commonwealth would be served by committing him to Byberry. It is my opinion that the Defender's Office does a great service to patients or prisoners who are the subject of a Lunacy Commission Hearing. In this instance, I was able to explain to the Commission that Farview would not be the place for this unfortunate man, and the Commission readily and eagerly accepted my advice. I feel that it is very likely that the patient would have been committed to Farview had a representative of the Voluntary Defender's Office not been there to represent his interests. I also feel the Commission was not fully aware of the difference between Farview, Byberry, Norristown, etc.

ROBERT L. BENNETT

STATISTICAL SUMMARY

In the month of April, the Association served 1139 persons: 85 in bail cases, 296 in prison cases, 33 in the Federal Court, 577 in Magistrates' Courts, 111 having post-conviction problems and 37 through special and advisory services. During the month there were 368 interviews held at the Philadelphia Prisons and 774 Defender cases listed for trial.

Respectfully submitted,

HERMAN I. POLLOCK

APPENDIX D

Letter From Hon. Michael Di Salle to Hon. Sam Ervin Appearing in Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Eighty-seventh Congress, First Session (1961) at pp. 123-124.

The State of Ohio,
Office of the Governor,
Columbus, March 20, 1961.

Hon. Sam J. Ervin, Jr.,
U.S. Senator
Senate Office Building, Washington, D.C.

Dear Senator:

Thank you very much for your very kind inquiry of March 16. I appreciate Senator Lausche's suggestion that you write to me.

Two years ago, I began a hospital-by-hospital visit in Ohio. We have 25 mental institutions. In my visits I was quite struck by the number of people over the age of 65 who had been committed to our institutions. Upon inquiry from the central office and an inventory and diagnosis of the patients, we found that 25 percent of our patients were over the age of 65—9,000 in number—and of this number, approximately half, or 4,500 were not psychotic or mentally ill in the commonly accepted sense.

These people were there as a result of someone refusing to accept the responsibility of their care or not being able to assume the responsibility. In many cases local subdivisions found that committing these people to mental institu-

tions would eliminate a local financial burden and they were perfectly willing to have the State assume it.

We have now begun a program of releasing these people to nursing or rest homes, transferring them to the welfare program where they rightfully belong. To date, we have transferred 1,500, and we may very well reach a total of 3,000 before we complete this project.

The significant thing to me was that, under the State commitment law, this was possible. We are recommending to this session of the legislature a change in commitment laws in order that the State mental health department may have a chance to observe the potential patient for a period of 30 to 60 days before commitment. If we do not take this step, we will be having admitted almost automatically the same number of people who do not belong in our institutions.

This is harmful in many respects. It takes our limited facilities and divides them among people who are in need of treatment and people who are not. This increases the cost of the program, for these people are chronically ill, being senile, or, if they are not at the time of admission, many of them become greatly disturbed by their surroundings. We know how difficult it is for a well person to meet the contingencies of today. Just think how difficult it is for an older person to be put into an institution with mentally ill persons. How long can they withstand the disturbances that are bound to occur?

I feel that this is a problem which the States must meet in order to protect the constitutional rights of individuals who are in many cases wrongfully placed in mental institutions. I think that you will find that the most advanced

in the programs are arranging for voluntary and tentative commitments pending observation. This I think will go a long ways toward resolving the problem, but it has to be a 50-State effort and, consequently, any direction or education on this subject that would emanate on the Federal level would be extremely helpful.

You certainly are free to use my statement in any way you deem best.

Sincerely,

MICHAEL V. DI SALLE, Governor.

P.S.—Another phase that we are examining is the restoration of civil rights during a period of trial visit.

APPENDIX E

New York Laws Relating to Commitment in Force on December 6, 1961

1. Laws of 1950, c. 229, §2

[McKinney's N.Y. *Correction Law*, §375]

The grounds and property located at Dannemora, in the County of Clinton, and the buildings erected thereon, shall continue to be known as Dannemora state hospital. Such hospital shall be used for the purpose of confining and caring for such male prisoners as are declared insane while confined in a state prison, reformatory, penitentiary or institution for male defective delinquents, who have been sentenced or committed thereto for a felony and others provided for under section three hundred eighty-three. The department of correction shall have jurisdiction and control of such hospital; but it shall be subject to visitation and inspection by the head of the department of mental hygiene, by himself and his authorized representatives from the department of mental hygiene.

2. Laws of 1950, c. 229, §1

[McKinney's N.Y. *Correction Law*, §383]

Whenever the physician or the psychiatrist of any one of the state prisons, reformatories or penitentiaries or of the institution for male defective delinquents shall certify to the warden or superintendent thereof, that a male prisoner confined therein and sentenced or committed thereto for a felony or committed to or retained by the institution for male defective delinquents pursuant to the provisions of sections 338, 338-a, 438-b, and section 440, is, in his opin-

ion insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora state hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. The warden or superintendent, before transferring such insane prisoner, shall see that he is in a state of bodily cleanliness. At the time of such transfer there shall be transmitted to the superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician or psychiatrist, which shall be filed in the office of such superintendent who shall file a notice of such transfer in the office of the department of correction.

3. Laws of 1961, c. 429

[McKinney's N.Y. *Correction Law*, §§384, 385]

Section 1. Section three hundred eighty-four of the correction law, as amended by chapter three hundred seventy-seven of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§384. *Certification of insane prisoners after the expiration of their terms*:

1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of

mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments. The costs necessarily incurred in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora state hospital, and be paid in the same manner as are other expenses of such hospital.

2. A patient committed to the custody of the commissioner of mental hygiene and placed in an appropriate institution in the department of mental hygiene or the department of correction pursuant to the provisions of this section may at any time during the period of his commitment be transferred to an appropriate state institution in the department of mental hygiene or in the department of correction, which has been designated for the custody of such patient by agreement between the heads of the two departments.

3. All persons retained in Dannemora state hospital pursuant to a valid order of retention issued in accordance with the provisions of this section prior to September first, nineteen hundred sixty-one shall be deemed to have been committed to the custody of the commissioner of mental hygiene pursuant to subdivision one of this section and shall be deemed to have been placed in the custody of Dannemora state hospital by designation of the commissioner of mental hygiene and the commissioner of correction pursuant to subdivision one of this section. Any such patient in the Dannemora state hospital may be transferred to any appropriate state institution of the department of mental hygiene or of the department of correction as may be desig-

nated for the custody of such patient by agreement between the heads of such departments.

4. §2. Section three hundred eighty-five of such law, as amended by chapter three hundred fifty-four of the laws of nineteen hundred fifty-nine, is hereby amended to read as follows:

§385. *Discharge of insane prisoners at expiration of terms*:

Notwithstanding any other provisions of law to the contrary, the director of the Dannemora state hospital may discharge prisoner at the expiration of his sentence, and who is still insane, but who has not been committed to the custody of the commissioner of mental hygiene and, in the opinion of the director, is reasonably safe to be at large. Such discharged prisoner shall be entitled to fifty dollars in money and suitable clothing adapted to the season in which he is discharged.

5. Laws of 1961, c. 504

[McKinney's New York *Mental Hygiene Law,* Section 76 as amended by,

Laws of 1964, c. 738, Section 6

[Renumbered McKinney's *Mental Hygiene Law,* Section 74]

Note: Material in brackets appeared in the 1961 law and was deleted by the 1964 amendment. Italicized material was added by the 1964 amendment.

§6. Section seventy-six of such law, as last amended by chapter five hundred four of the laws of nineteen hundred sixty-one, is hereby renumbered section seventy-four of

such law and as so renumbered is hereby amended to read as follows:

§[76] *74.* Review of [proceedings and] *court authorization* [order of certification] *to retain a patient.* If a person [certified to the jurisdiction of the department or an institution,] *whose retention, continued retention or transfer and continued retention has been authorized* pursuant to this [chapter] *article,* or any relative or friend in his behalf, be dissatisfied with [the final] *any such* order [of a judge or justice certifying him,] he may, within thirty days after the making of *any* such order, obtain a rehearing and a review of the proceedings already had and of such [certification] *order,* upon a petition to a justice of the supreme court other than the *judge or* justice *presiding over the court* making such [certification] *order,* who shall cause a jury to be summoned as in the case of proceedings for the appointment of committee for a mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the [person so certified] *patient so authorized to be retained,* in the same manner as provided in said proceedings. *Any such patient or the person applying on his behalf for such review may waive the trial of the fact by a jury and consent in writing to trial of such fact by the court.* If such petition for rehearing and review be made by any other than the person so [certified] authorized to be retained or the father, mother, husband, wife or child of such person or the person with whom the person [certified] *so authorized to be retained* was residing at the time *of the making* of such [certification] *order authorizing continued retention* or accustomed to reside, before such rehearing or review shall be had, the petitioner shall make a deposit or give a bond, to be approved by a justice of the supreme court, for the payment of the costs and expenses

of such rehearing, review and determination of the question of mental illness by a jury as aforesaid, if the order [of certification] *authorizing continued retention* is sustained. If the verdict of the jury, *or the decision of the court when jury trial has been waived,* be that such person is [sane] *not mentally ill,* the justice shall forthwith discharge him, but if the verdict of the jury, or *the decision of the court where a jury trial has been waived,* be that such person is mentally ill, the justice shall certify that fact and make an order [of recertification] *authorizing continued retention under the original order* [as upon the original hearing]. Such order shall be presented, at the time of [the recertification] *authorization of continued retention* of such mentally ill person, to, and filed with, the director [or person in charge] of the [institution to] *hospital in* which the mentally ill person is [certified or to the institution or facility in the department designated by the commisioner to receive and retain such person as a patient] *authorized to be retained,* and a copy thereof shall be forwarded to the department by such director [or person in charge] and filed in the office thereof. Proceedings under the order shall not be stayed pending an appeal therefrom, except upon an order of a justice of the supreme court, and made upon a notice and after a hearing with provisions made therein for such temporary care or confinement of the alleged mentally ill person as may be deemed necessary. If a judge or justice shall refuse to grant an application for an order [of certification] *authorizing continued retention* of a mentally ill person proved to be dangerous to himself or others, [if at large,] he shall state his reasons for such refusal in writing, and any person aggrieved thereby may obtain a rehearing and review and the determination of the question of mental illness by a jury in the same manner and under like conditions as from an order [of certification] *authorizing continued retention.*

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IN THE

Supreme Court of the United States

October Term, 1965

No. 219

JOHNNIE K. BAXSTROM,

Petitioner,

v.

R. E. HEROLD, Director, Dannemora State Hospital,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF AND APPENDICES FOR RESPONDENT

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IN THE

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No. 219

JOHNNIE K. BAXSTROM,

Petitioner,

v.

R. E. HEROLD, Director, Dannemora State Hospital,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT

Constitutional Provisions and Statutes Involved

This case involves the Sixth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the following Laws of New York (the relevant portions appear in Appendices B & C): Correction Law §§ 375, 377, 380, 383, 384, 385, 386, 388, 400, 402, 405, 408, 409 and 410; Mental Hygiene Law §§ 2, 3, 5, 7, 10-a, 11, 15, 20, 21, 23, 70, 72, 73, 74, 75, 85, 86, 87, 88, 100 and 426; Civil Practice Act §§ 7001-7012.

Questions Presented

1. Whether retention, after expiry of sentence of a person in a State hospital—maintained for the care and treatment of insane criminals, the criminally insane and the dangerous civilly insane—to which he was committed under New York Correction Law while serving a prison sentence, violates any constitutional guarantee.

2. Whether at the judicial hearing furnished a patient of such hospital upon expiry of sentence, due process and equal protection require that counsel be assigned to the patient and that such hearing be a trial by jury.

Statement of the Case

Petitioner, a multiple offender convict, was duly certified as insane in 1961 and was transferred from prison to Dannemora State Hospital (R. 2).[1] This is a fact admitted and not in issue.

Dannemora is a hospital maintained for insane criminals, the criminally insane, and certain dangerous civilly insane (A. 6,[2] Correction Law § 375).

Upon expiry of sentence (December 18, 1961), petitioner was duly retained in Dannemora (A. 8, Correction Law § 384). Pursuant to (a) the hospital director's petition (R. 2, 3), (b) certification of two court-assigned, disinterested examining physicians (R. 3-5), (c) service of notices of judicial hearing upon petitioner and next-of-kin (R. 7-10), and (d) judicial hearing and decision thereon December 6, 1961 (R. 11), then and only then was petitioner certified by judicial order to the custody of the Commissioner

[1] Hereinafter referred to as Dannemora.

[2] Refers to page in Appendices.

of Mental Hygiene to be placed in an appropriate state institution of the Department of Mental Hygiene or of the Department of Correction (R. 12).

It is to be noted that certification, transfer, retention by reason of insanity and subsequent *habeas corpus* proceedings were severally tested by separate judicial hearings. Though no counsel represented petitioner, he himself was present at all times and was given full scope to speak and to question (R. 14-18; 22-30; 41-44).

Writs of *habeas corpus,* after judicial hearings, were dismissed in 1962 and in 1963 (R. 31, 32; 45, 46). Each petition was on the same grounds. The Appellate Division of the Supreme Court, State of New York, affirmed the 1963 order of dismissal (R. 46-47). The Court of Appeals of the State of New York denied a motion for leave to appeal (R. 48).

This Court granted certiorari (R. 49; 381 U. S. 949).

POINT I

Dannemora State Hospital, in which petitioner is retained, is a hospital and not a prison. At expiry of sentence, those who had been committed to Dannemora from a prison, are transferred from the custody of the Department of Correction to the custody of the Department of Mental Hygiene. This hospital under jurisdiction of the Department of Correction is substantially similar to hospitals under jurisdiction of the Department of Mental Hygiene. Petitioner's retention is fundamentally fair. There is no deprivation of petitioner's constitutional rights.

A

The New York Department of Correction maintains hospitals which are separate and independent of its prisons.

Its patients require a greater degree of security precautions than in the hospitals the Department of Mental Hygiene maintains.

In contrast to prisons, Correction and Mental Hygiene hospitals are substantially similar:

(1) The hospitals are not on prison grounds; Dannemora is *outside* the walls of Clinton Prison (Appendix I); administratively as well as physically it is completely independent;

(2) Physicians, not wardens, are the chief executive officers (A. 6, Correction Law § 377);

(3) There are no walls or fences; security is only within;

(4) There are no guns or nightsticks carried by personnel;

(5) There is no punishment or loss of time nor are there trusties;

(6) There is no compulsory labor;

(7) There are no cells; rooms are larger, and dormitories and wards predominate; space requirements per patient are alike—and larger than in any prison;

(8) Visiting rights are liberal; no separation by screens or barriers; no attendant present within hearing distance; no stripping and searching of patients before and after visits;

(9) Assaultive and dangerous patients are placed in restraint and seclusion when necessary;

(10) Standards of medical care and treatment are comparable; hospital, drug and medical costs are highest at Dannemora (*cf.* A. 46 through A. 51);

(11) The ratio of staff to patients is comparable;

(12) Physicians make daily rounds and see every patient; physicians are accessible at any time for private interviews; thus there are no "forgotten men".

Also, see Appendix D (A. 42).

Petitioner contends that Dannemora is "maintained at a penal institution" (Ptr's Br., p. 9). He errs. His reliance on *People ex rel. Brown* v. *Johnston,* 9 N. Y. 2d 482 (1961) and *People ex rel. Kamisaroff* v. *Johnston,* 13 N. Y. 2d 66 (1963), is misplaced (Ptr's Br., n. 1, p. 9). In both cases no issue was ever raised that Dannemora was a *prison.* Dannemora is a *bona fide* hospital unattached to any penal institution. Remarks in the *Kamisaroff* and *Brown* opinions on this point are based on erroneous assumptions. These observations have less force than *dicta,* for they do not relate even remotely to the issues. The issues there were the rights to judicial hearing and to jury trial and as to both, the New York Court of Appeals held in accordance with our position in the instant case.

Other than *dicta* and unsupported allegations of insubstantial matter, petitioner has failed to offer any real evidence that Dannemora is not a hospital.

True, the Department of Correction has jurisdiction of Dannemora. But statutes require cooperation and mutuality of purpose between the Departments of Correction and Mental Hygiene (e.g., A. 22, 23; Mental Hygiene Law §§ 11, 20, 21).

Dannemora is visited and inspected by Mental Hygiene (A 6; Correction Law § 375). Examining physicians must have like qualifications (A. 7, Correction Law § 383[1]; A. 19, Mental Hygiene Law § 2[18]). All papers in commitment proceedings must be filed with Mental Hygiene (A. 8, Correction Law § 383[5]). Retention after expiry of sentence transfers custody of the patient to Mental Hygiene (A. 8, Correction Law § 384[1]). By agreement between Mental Hygiene and Correction, a patient may be placed in "an appropriate institution" in Mental Hygiene or Correction (A. 10, Correction Law § 384[2, 3]).

Staff personnel are interchangeable (A. 20, Mental Hygiene Law § 5). Also, civil service specifications for Correction *hospital* personnel differ markedly from those for *prison* personnel (A. 52-62). Mental Hygiene is empowered to investigate a Correction hospital (A. 21, Mental Hygiene Law § 7[8]; A. 36, Mental Hygiene Law § 86). Patients may be transferred to a Correction hospital from any Mental Hygiene hospital (A. 21, Mental Hygiene Law § 10-a). Forms for use in procedures for admission to Correction hospitals are furnished by Mental Hygiene (A. 9, Correction Law § 384[1]; A. 24, Mental Hygiene Law § 70[2]; R. 1-13). Patients retained under Correction Law § 384 may be discharged by Mental Hygiene (A. 38, Mental Hygiene Law § 87[3]).

In short, Correction and Mental Hygiene are as one in the matter of caring for and treating the mentally ill.

To any observation that the very fact that time is credited means a prison, the answer is: All felons, placed in civil hospitals for surgery or treatment, continue to serve sentence; the hospital hardly becomes a prison for that reason.

Dannemora being a hospital, petitioner's conversion, by expiry of term, from *insane criminal* to the status of *criminally insane* (one with dangerous or criminal propensities) is not decisive of the issues in this case.

B

It is fundamentally fair to retain patients, requiring hospitalization as still insane, after expiry of sentence if two factors are present: (1) Rational basis for the classifications; and (2) Adequate safeguards for persons affected before retention, accompanied specifically by the two essential elements of (1) notice and (2) opportunity to be heard.

Many are insane but not criminal. He who commits repeated felonies and after conviction becomes insane, may fairly be described, we think, as "doubly abnormal". A tick of the clock surely does not end this double abnormality. Proven criminal tendencies, together with continuing insanity, set apart those so marked. To commingle this group with the civilly insane would serve only to inflict harsh and unreasonable discrimination on the civilly insane. In an environment of loose security and relaxed observation, the civilly insane would be subjected to unjustified dangers at the hands of the "doubly abnormal".

Figures on violence demonstrate that it is fair and reasonable to classify the criminally insane as a group. Four hundred sixty-two patients (roughly one-half of the total Dannemora population) are retained under Correction Law § 384 as of November 18, 1965. This is their record:

Robbery	— 120
Assault	— 88
Burglary	— 93
Manslaughter	— 28
Carnal abuse	— 3
Sodomy	— 5
Grand Larceny	— 72
Rape	— 13
Carrying Concealed Weapon	— 11
Incest	— 2
Bigamy	— 1
Receiving Stolen Property	— 2
Arson	— 10
Drugs	— 9
Forgery	— 5
	462

"The Constitution in enjoining equal protection of the laws upon the States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opin-

ion to be treated in law as though they were the same' " (*Goesaert* v. *Cleary*, 335 U. S. 464, 466).

"Equal protection does not require identity of treatment. It only requires that classification have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. * * * Our disapproval of the wisdom or fairness [of the classification] * * * is not a ground for interference" (*Walters* v. *City of St. Louis*, 347 U. S. 231, 237). "The test is whether it has some foundation in experience, practicality or necessity" (*MacDougall* v. *Green*, 335 U. S. 281, 289).

"Experience, practicality and necessity" furnish solid foundation for classification of the "criminally insane". The classification has relevance to the dangers intended to be avoided and the treatment of the two classes is "not so disparate" as to be "wholly arbitrary".

The second factor determining fundamental fairness relates to safeguards of the rights of the patient. Are there adequate and proper means to establish or to refute that a patient is criminally insane?

First, the essential elements of notice and opportunity to be judicially heard are provided (Correction Law § 384 [1]). Second, two court-appointed, disinterested physicians examine and certify the patient (*id.* [2]).

Any time thereafter (and as often as he desires), the retained patient may apply for his discharge to a court of record (Mental Hygiene Law § 87[3]) or he may employ *habeas corpus* (Civil Practice Act §§ 7001-7012). Also, he or a relative or a friend can resort to *habeas corpus* under Mental Hygiene Law § 426.

Of importance is the fact that New York has just this year created new, special and extra safeguards for *retained*

involuntary patients (A. 39, Mental Hygiene Law § 88). The Presiding Justice of each appellate division in the State appoints a staff to study and review admission and retention of involuntary patients. This arm of the court protects civil and constitutional rights of the patients (the staff is composed of lawyers and civil service personnel) by means of (1) full investigations, (2) formal, written reports to the judge holding the sanity hearing (he has discretion to assign counsel if needed) and (3) attendance at the hearing, representing the patient and eliciting testimony from all parties and witnesses.

New York provides other statutory requirements designed to protect the rights of the mentally ill. Complete case records and information are required to be filed with Mental Hygiene (A. 22, 23, Mental Hygiene Law §§ 20, 21); examining physicians must certify mental condition, pursuant to administrative order authorized by law or court order (A. 24, Mental Hygiene Law § 70[1, 2]); certificates to the court must set forth the facts and circumstances underlying the physicians' judgment (*id.* [4]); certificates must be backed up by a staff physician's examination at admission (A. 25, Mental Hygiene Law § 72[1]); notice with information as to his rights must be given to a patient and to his nearest relative (*id.* [2]); a patient may have a judicial hearing on the need for hospitalization within sixty days after admission (*id.* [3]); if he does not ask for a judicial hearing, the director of the hospital may apply for a court order of limited retention, with notice to the patient and to his nearest relative, and the patient may then ask for a judicial hearing (A. 28, Mental Hygiene Law § 73); a *dangerous* civilly insane patient may be certified to a Correction hospital by two court-assigned physicians after notice and judicial hearing (A. 33, 34, Mental Hygiene Law § 85); with court aid when needed, Mental

Hygiene may investigate illegal detention in *any* hospital and improper care and treatment (A. 36, Mental Hygiene Law § 86).

The highest New York court, the Court of Appeals, has ruled that retention in Dannemora, pursuant to Correction Law § 384, is constitutional on the grounds that the classification is reasonable, that the patient can always resort to procedure under Mental Hygiene Law § 87[3]) for a discharge and that he has the right of appeal to the higher courts (*People ex rel. Kamisaroff* v. *Johnston,* 13 N. Y. 2d 66 [1963]; *People ex rel. Brunson* v. *Johnston,* 15 N. Y. 2d 647 [1964]).

At least seven States[3] have statutes similar to those of New York as to retention of insane criminals after expiry of sentence. The Supreme Judicial Court of Massachusetts has declared:

> "[Petitioner's] continued confinement after expiration of his sentence in an asylum for insane criminals would be in accord with policy established by the State that the criminal insane, or persons who have been vicious in their lives, should be confined in an institution especially devoted to their care.
>
> "We discover nothing unconstitutional in the statute * * *. 'Petitioner is entitled, as a matter of right, to institute judicial proceedings under the statute to determine the necessity or propriety of his confinement.' * * * the right to institute judicial proceedings under statutes is a sufficient protection of his liberty 'to meet constitutional requirements' ". (*In re LaDonne,* 173 Mass. 550; 54 N. E. 244, 245 [1899].)

The same Court, in *LaMorre* v. *Supt. of Bridgewater State Hospital,* 199 N. E. 2d 204 (1964), affirmed this position that a retention statute is not penal "but merely a method for identifying, isolating and curing * * *".

---

[3] Georgia, Iowa, Louisiana, Massachusetts, Michigan, Ohio, Pennsylvania.

C

Petitioner (1) is rightfully classified in the "criminally insane" group and (2) his constitutional rights have not been violated.

In 1961 petitioner was administratively transferred from prison to Dannemora under a former statute (Ptr's Br., p. 64) that has been replaced by present Correction Law § 383. Petitioner was found to be "violent and dangerous" because of "convulsive disorder, epileptic deterioration" (R. 2).

In late 1961 two court-assigned, disinterested physicians examined petitioner and found him to be, among other things, "aggressive", particularly following epileptic seizures (R. 4, 5). There has been organic deterioration of the brain (R. 28). Concerning petitioner's statement that his epilepsy "is equally applicable to the two million epileptics in the United States" (Ptr's Br., p. 15), it might not be remiss to point out that the vast numbers of epileptics possess neither criminal tendencies nor records of criminal violence, in marked contrast to petitioner.

Dr. Ian Kerr's statement that "there is no reason why [petitioner] could not be treated in a civil mental hospital" (Ptr's Br., p. 15 and discussion) might better be evaluated in light of the preceding colloquy about a desired transfer to an out-of-state hospital, and weighed against the same doctor's professional diagnosis of "organic deterioration of [petitioner's] brain" and his acceptance of "assaultive tendencies" on petitioner's part (R. 28).

After due notice and judicial hearing at expiry of sentence, petitioner was certified by court order as mentally ill. He was placed in the custody of the Commissioner of Mental Hygiene to be kept in an appropriate State institu-

tion of Mental Hygiene or of Correction (R. 7-18; Correction Law § 384 [A. 8]).

Petitioner incorrectly claims that he "would have been entitled to a jury trial" under the Mental Hygiene Law (Ptr's Br., p. 16). Such right is granted only to those retained *pursuant to Mental Hygiene statutes* (A. 30, § 74). Those retained under Correction Law § 384 are expressly dealt with in Mental Hygiene Law § 87[3] (A. 38). (And see *id.* [1].)

Since 1961, petitioner has, by means of *habeas corpus,* received two judicial inquiries before different judges. Court-assigned, disinterested physicians (R. 42), by personal examinations, have confirmed the original findings. Petitioner has been given full opportunity to be heard in open court.

On the bases of these independent findings and periodic examinations of petitioner's conduct and record as reported by staff physicians, as well as by personal examinations of Mental Hygiene physicians, it has been confirmed that petitioner is not suitable for care in a Mental Hygiene hospital (R. 38; Appendix A-1).

We submit there has been no evidence of an unreasonable, arbitrary or capricious act. Petitioner's constitutional rights have been protected.

POINT II

Under Correction Law § 384, retention of the criminally insane at expiry of sentence does not require assigned counsel and jury. The Sixth and Fourteenth Amendments do not grant these rights in a civil proceeding. The fact that a statute grants the *civilly* insane right to a jury does not discriminate against the *criminally* insane.

Petitioner may not demand assigned counsel and jury as a matter of right in a *habeas corpus* sanity hearing, since it is a civil proceeding. Here, too, we have a civil proceeding. *Gideon* v. *Wainwright*, 372 U. S. 335, and similar decisions of this Court, which hold there is a right to assigned counsel, arise out of criminal prosecutions.

Petitioner now demands assigned counsel under the Fourteenth Amendment (Ptr's Br., p. 11). He also demands a jury on the ground that a statutory grant of that right only to the *civilly* insane (A. 30; Mental Hygiene Law § 74) is arbitrary (Ptr's Br., p. 21).

The Sixth Amendment limits counsel and jury to criminal prosecutions.

"The Due Process Clause does not guarantee to a citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the procedure and the character of the rights which may be affected by it" (*Dohany* v. *Rogers*, 281 U. S. 362, 369). This Court reaffirmed the principle in *Armstrong* v. *Manzo*, 380 U. S. 545. Assignment of counsel was *not* declared to be required.

Ulterior motives too often accomplish the commitment or continued detention of alleged civilly insane persons. Avarice, hatred, self-interest move individuals to railroad or frame even those closest to them. Allegations and denials, charges and counter-charges raise issues of fact related to the question of sanity. A judge may not be able to cope with all these side issues. Here counsel and jury serve a vitally useful purpose.

Vastly different is the case of an alleged criminally insane. The risk of a miscarriage of justice is remote, if not totally absent. His sanity hearing is held in vacuum, so to speak, as to sterilize the sole issue of sanity free of any other issue or consideration. Court-appointed, disinterested physicians can hardly be suspect of ulterior motives in the case of the criminally insane already in a State hospital. It is fair to presume that the court has appointed only a qualified, reputable, objective and impersonal physician to report findings to the court, whether it be under the Correction and Mental Hygiene laws or in *habeas corpus*.

Counsel and jury may be vital factors when an *accusatory* proceeding comes into play, for the purpose is *penal*. But as this Court said of an arson investigative proceeding which barred attorneys, *since it in no way sought to fix or adjudge responsibility,* "[this is] * * * not a criminal trial * * * [but] * * * *a proceeding solely to elicit facts*" (*In re Groban,* 352 U. S. 330, 332) (Emphasis added). This is true of a proceeding under Correction Law § 384. And Justice FRANKFURTER's observation is equally true: "The assumption that as a normal matter such an inquiry carries with it deprivation of some rights of a citizen assumes inevitable misuse of authority. For good reasons, and certainly for constitutional purposes, the contrary assumption must be entertained" (*id.* p. 336).

"The constitutional rights to counsel held to be essential in criminal cases * * * are not necessarily applicable to proceedings of this sort" (*LaMorre* v. *Supt. of Bridgewater State Hospital,* 199 N. E. 2d 204, 206 [1964]).

In *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U. S. 270, there was an examination by two court-appointed doctors, *there was no jury* and counsel was assigned at the court's *discretion.* This Court found a rational basis in grouping sex psychopaths as "constitutin[g] a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest" (p. 275).

The searching out of a *condition* of the mind, with the help of court-appointed, disinterested physicians at an open judicial hearing and on notice, no more requires the assistance of a lawyer and jury than does the searching out of smallpox or any contagion of the body. If mental condition be *essentially* a legal rather than medical question, so is any physical condition which results in restriction of liberty.

The loss of liberty that ensues upon a finding of insanity is an unhappy concomitant—not a penalty. Insanity being no offense, counsel and jury are not necessary elements in every case else fundamental fairness is lacking.

The case at bar is distinguishable from *Skinner* v. *Oklahoma,* 316 U. S. 535, cited by petitioner. Favoring one type of habitual offenders there over all other types of habitual offenders *for no ascertainable reason* is discriminatory. Here, the criminally insane are classified differently from those lacking criminal tendencies for the good reason that the former are dangerous. As Mr. Justice BLACK pointed

out: "Indeed, showing that different persons are treated differently is not enough, without more, to show a denial of equal protection. It is the circumstances of each case which govern" (*Griffin* v. *School Board*, 377 U. S. 218, 230).

Mr. Justice CLARK noted the greater need to provide statutory safeguards for those insane "who were not charged with criminal offense or who had never exhibited any criminal proclivities" (*Lynch* v. *Overholser*, 369 U. S. 705, 722). He also declared that "the insane who have committed acts otherwise criminal are a still greater [than dangerous civilly insane] object of concern as they have demonstrated their risk to society" (*id.*, 724).

In *Skinner*, this Court wrote:

> "[The States] may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. * * * Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing 'degrees of evil' [nor] 'that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' * * * For a State is not constrained in the exercise of its police power to acknowledge experience which marks a class * * * for special treatment. Nor is it prevented by the equal protection clause from confining 'its restraints to those classes of cases where the need is deemed to be clearest.' * * * 'the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated * * *' " (p. 540).

We submit that New York, by applying without any irrational discrimination a policy of having the criminally insane examined before retention by two court-appointed, disinterested physicians and by notice and judicial hearing, fully conforms to the guidelines set out in *Skinner*.

Petitioner's position is simply and totally unrealistic.

CONCLUSION

For the reasons stated it is respectfully submitted that the order of the Court of Appeals of the State of New York should be affirmed.

Dated: Albany, New York, November 24, 1965.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent

RUTH KESSLER TOCH
Acting Solicitor General

ANTHONY J. LOKOT
Assistant Attorney General
of Counsel

PAUL D. McGINNIS
COMMISSIONER

August 19, 1963
CONFIDENTIAL

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DIVISION OF IDENTIFICATION
ALBANY, N. Y.

This certifies that fingerprints of the following named subject have been compared and the following is a true copy of the records of this Division.

PAUL D. McCANN
Director

D. C. I. NO. 548643X B M 5 8½ 1917

Contributors of Fingerprints	*Name and Number*	*Arrested or Received*	*Charge*	*Disposition*
•PD Greensboro NC	Johnnie Kell Baxstrom 27662	2-23-48	asslt. female W. D. W.	
•PD Baltimore Md	Johnnie Kell Baxstrom 74-320	1-12-50	2 cases Asslt & 1 Larceny	2-8-50 found NG in all cases on chg of 2 cases of asslt & cutting and larceny
•PD Greensboro NC	Johnnie Calvin Braxstrom 31134	6-28-50	affray W. D. W.	12 mos. roads
•B of I Pr Div Raleigh NC 250415	Johnnie K. Bastrom	7-1-50	affray asslt on female	12 mos. 3-26-51 disch. by exp.
•PD Kannapolis NC	Johnnie Kell Baxter 1415	12-25-51	inv.	was rel after talking to same
•PD Spartanburg SC	Johnnie Kell Baxstrom 6037	10-11-52	trespassing on Southern Railway property—Loitering	10/14/52 rel

APPENDICES
Appendix A

Contributors of Fingerprints	*Name and Number*	*Arrested or Received*	*Charge*	*Disposition*
(above rep Wash Bur)				
*SP B of I Raleigh NC 281368	Johnnie O. Braxton Camp #506 Greensboro NC	11-3-52	drunk	30 days 11-25-52 exp.
*SPr Raleigh NC 283678	Johnnie Baxstrom Camp #506 Greensboro NC	1-5-53	drunk	90 days 3-14-53 exp.
*MD H of C Jessups Md	John K. Baxter 72-369	1-25-54	vagrant	6 mos. D-6-18-54
*PD Baltimore Md	Johnnie T. Baxtrom 74-320	9-11-54	susp. of asslt & robbery	12-17-54 FG 1 yr MHC from 9-14-54
*H of C Jessups Md	Johnnie T. Baxstrom 74-854	12-17-54	robbery	1 yr exp 9-14-55
(above rep Wash Bur)				
SO Rochester NY	Johnie K. Baxstron 28576 Johnnie K. Baxstron	9-17-55	Dis. Cond.	
Monroe Co Penty Rochester NY	John Baxtron J-20340 John Keil Baxstrom	sent 9-26-55 rec 9-26-55	Dis. Cond.	6 mos. Monroe Co. disch 1/25/56
*PD, Rochester, NY		3-8-56	intox.	sen. susp. 3-10-56
*PD, Rochester, NY (rep. same)		5-22-56	intox.	sen. susp. 5-22-56
PD Syracuse NY	John Kell Baxstrom 2891-N	9-4-56	Pub. Intox.	9-5-56 30 days susp. & $10.00 or days

*PD, Rochester, NY (rep. same)		6-9-56	intox.	$5 bail forf. 6-11-56
Onondaga Co Penty Jamesville, N. Y.	John Kell Backstrom L-40821 Johnnie K. Baxstrom	sent. 9/5/56 recd. 9/5/56	publ intox.	Onon $10 or 10 days
*PD, Rochester, NY (rep. same)		10-6-58	intox.	30 ds. sen. susp 10-17-58
PD, Rochester, NY	Johnnie Kell Baxstrom al–John K. Bakstrum al–John Kell Baxtrum 33083	10-21-58	aslt. 2nd	2-3 yrs. Attica Pr. 4-9-59
*Monroe Co Penty (repeater slip)	John K Baxstrom John Baxtron J 20340	10/22/58	Public intox	60 dys (Monroe Co)
SO Rochester NY	Johnnie K Baxstron 28576	12/20/58	Assault 2nd (Indict. Warrant)	4-9-59 Attica Pr. 2-3 yrs.
Attica Prison Attica NY	John K. Baxstrom #T 16215	sent 4-9-59 recd 4-9-59	Asslt. 2nd (vio. sec. 242-4	2-0/3-0-0 2nd offender (Monroe Co.) 4-23-59 was resentenced by Monroe County to a term of 2-6-0/3-0-0 for the crime of Assault 2nd. transferred to Dannemora State Hospital 6-1-61 #6887.

*Represents notations unsupported by fingerprints.
Please advise if we can be of further assistance to you in this matter.

Appendix A-1

DANNEMORA STATE HOSPITAL

Patient's Name: John K. Baxstrom.
Id. No.: 789755.
Date of Examination: Sep 28 1965.
Ward No.: .....
Sex: Male.
Age: 47.
Civil Condition: Separated.
County of Residence: Monroe.
Address: 511 Almond Street, Syracuse, New York.
Date of Admission: June 1, 1961.
From: Attica Prison.
To what Extent was Alcohol Used? Moderate.
Drugs? No.
Criminal Offense—Describe: Assault 2°—Vio. Sec., 242-4 Penal Law.
Assaulted police officer—J. McCarthy—ice pick on face, forehand and collarbone on street—night.
Sentence: 2-6-0/3-0-0.
Date: 4/23/59.
Term Expired: Dec. 18, 1961.
Previous Criminal Record (Associated Violence?): Assault of Female, Larceny, Drunk, Vagrant, Disorderly Conduct.
History of Violence Following Incarceration: .....
Behavior During Hospitalization (Irritability, Threats, Assaults): disturbed episode on September 2, 1965.
Work Record: Good worker in O. T.
Present Physical Condition: Satisfactory except for grand Mal seizures.
Present Mental Condition (Plus I. Q. or Other Psychological Test): Well oriented but superficial and silly.

Appendix A1.

Mental Diagnosis: Psychosis due to convulsions, disorderly, epileptic deterioration.
Next of Kin: Sister: Sarah Stevenson.
Address: Route #3, Corfu, New York.
Patient's Appreciation of Relatives and Visits, Etc.: .....
Interest Shown by Relatives and Frequency of Visits or Letters: no visits, frequent letters.

John K. Baxstrom
Id. No. 78 97 55

This 47-year old Negro male was admitted to Dannemora State Hospital 6/1/61 from Attica Prison. His criminal offense reportedly involved assaulting police officer with ice pick on face, forehand and collar bone on street at night. His 2½ to 3 year sentence expired December 18, 1961. His previous criminal record includes assault of female, larceny, vagrant—disorderly conduct. He was examined for transfer to a civil state hospital by Dr. Foster November 27, 1961 and disapproved. Since that time patient has been involved in many assaults and altercations. On January 14, 1963 he struck a blind patient knocking him to the floor. On July 22, 1965 it is reported that he tried to rally other patients against officers and was placed in restraint. A similar incident is reported September 2, 1965. The diagnosis is "Psychosis due to convulsions, disorderly, epileptic deterioration." He is receiving phenobarbital and Dilantin as well as Thorazine mg. 50 t. i. d. Writs of *habeas corpus* were dismissed in 1963 and 1964. Patient denies delusions and hallucinations but said "I couldn't hold my nerves together." This man is considered unpre-

dictable and dangerous and is not suitable for transfer to a civil state hospital.

L. L. B.
L. Laramour Bryan, M. D.
Assistant Commissioner

LLB:cs

Appendix B

RELEVANT PROVISIONS OF THE NEW YORK CORRECTION LAW.

"§ 375. *Establishment and purposes of the Dannemora State Hospital*

* * * [Dannemora State] hospital shall be used for the purpose of confining and caring for such male prisoners as are declared mentally ill while confined in a state prison, reformatory, penitentiary or institution for male defective delinquents, who have been sentenced or committed thereto for a felony and others provided for under section three hundred eighty-three. The department of correction shall have the jurisdiction and control of such hospital; but it shall be subject to visitation and inspection of the head of the department of mental hygiene, by himself and his authorized representatives from the department of mental hygiene."

"§ 377. *Superintendent*

The commissioner of correction shall * * * appoint a superintendent for the Dannemora state hospital, who shall be in the competitive class of the civil service and be a well

educated physician and a graduate of an incorporated medical college of at least five years' actual experience in a hospital for the care and treatment of the mentally ill. * * *"

"§ 380. *Powers and duties of superintendent and assistants*

The superintendent shall be the chief executive officer of the hospital and shall:

1. Have the general superintendence of the buildings and grounds, * * *.

2. Give, from time to time, such orders and instructions as he may deem best calculated to insure good conduct, fidelity and economy in every department of the hospital.

3. Maintain salutary discipline among all who are employed by the institution, and enforce strict compliance with all instructions and orders given by him, and uniform obedience to all rules and regulations of the hospital."

"§ 383. *Commitment of mentally ill prisoners to the Dannemora state hospital*

1. Whenever the physician or the psychiatrist of any one of the state institutions * * * shall certify to the warden or superintendent * * * that a prisoner * * * is in his opinion mentally ill, such warden or other officer shall apply to a judge of a court of record to cause an examination to be made of such person by two examining physicians other than a physician connected with such state [institution] * * * An examining physician * * * is a physician possessing the qualifications prescribed by the provisions of section two of the mental hygiene law. Such physicians, if satisfied, af-

ter a personal examination that such prisoner is mentally ill, shall make a certificate to such effect.

* * *

5. When an order of commitment is made, such order and all papers in the proceeding * * * be filed with the department of mental hygiene * * *"

* * *

"§ 384. *Certification of mentally ill prisoners after the expiration of their terms*

1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues mentally ill, the director shall* [apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments.] ***make application for his commitment. Application for commitment shall be made to a court of record or judge thereof, as that term is defined in section two of the mental hygiene law, in the county or, if application is made to the supreme court, in***

* Bracketed matter has been replaced by italicized provisions.

the judicial district where the institution is located. The application shall be made by a petition accompanied by the certificate of two examining physicians certifying to the defendant's need for institutional care and treatment Three days notice of the application, together with a copy of the petition, shall be served upon the prisoner and upon his nearest relative or, if none, upon any known friend within the state.

If there is no demand for a hearing, the court to which application is made may, if satisfied that the prisoner is in need of institutional care and treatment immediately issue an order for the commitment of the prisoner to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene or the state department of correction which has been approved by the heads of such departments.

If a hearing is demanded, the court shall, or it may upon its own motion, issue an order directing a hearing upon the application at a time not more than five days from the date of such order. Notice shall be served upon the parties interested in the application and upon such other persons as the court may determine. If after hearing held, the court shall grant the petition, it shall order the commitment of the prisoner to the custody of the commissioner of mental hygiene as stated above.

Commitment pursuant to this section shall be made upon blanks prescribed by the commissioner of mental hygiene and shall be deemed a civil commitment.

The costs necessarily incurred in determining the question of mental illness, including the fees of the medical

examiners, shall be a charge upon the amount appropriated for the support and maintenance of the [Dannemore] *Dannemora* state hospital, and be paid in the same manner as are other expenses of such hospital.

2. A patient committed to the custody of the commissioner of mental hygiene and placed in an appropriate institution in the department of mental hygiene or the department of correction pursuant to the provisions of this section may at any time during the period of his commitment be transferred to an appropriate state institution in the department of mental hygiene or in the department of correction, which have been designated for the custody of such patient by agreement between the heads of the two departments.

3. All persons retained in Dannemora state hospital pursuant to a valid order of retention issued in accordance with the provisions of this section prior to September first, nineteen hundred sixty-one shall be deemed to have been committed to the custody of the commissioner of mental hygiene pursuant to subdivision one of this section and shall be deemed to have been placed in the custody of Dannemora state hospital by designation of the commissioner of mental hygiene and the commissioner of correction pursuant to subdivision one of this section. Any such patient in the Dannemora state hospital may be transferred to any appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such patient by agreement between the heads of such departments.

§ 5. This act shall take effect September first, nineteen hundred sixty-five."

Appendix B.

"§ 385. *Discharge of mentally ill prisoners at expiration of terms*

* * * the director of the Dannemora state hospital may discharge any prisoner at the expiration of his sentence, and who is still mentally ill, but who has not been committed to the custody of the commissioner of metal hygiene and, in the opinion of the director, is reasonably safe to be at large. * * *."

"§ 386. *Prisoners on recovery to be transferred to prison*

Whenever any prisoner, who shall have been confined in such hospital as a mentally ill person, shall have recovered before the expiration of his sentence, and the superintendent thereof shall so certify in writing to the warden or superintendent of the institution from which such prisoner was received, or to which the commissioner of correction may direct that he be transferred, such prisoner shall forthwith be transferred to the institution from which he came * * *."

"§ 388. *Communications with patients*

No person not authorized by law or by written permission from the commissioner of correction shall visit the Dannemora state hospital, or communicate with any patient therein, without the consent of the superintendent; nor without such consent shall any person bring into or convey out of the Dannemora state hospital any letter or writing to or from any patient; nor shall any letter or writing be delivered to a patient, or if written by a patient, be sent from the Dannemora state hospital until the same shall

have been examined and read by the superintendent or some other officer of the hospital duly authorized by the superintendent. But communications addressed by such patient to the county judge or district attorney of the county from which he was sentenced, shall be forwarded, after examination by such superintendent, to their destination."

"§ 400. *Establishment and purpose of the Matteawan state hospital*

* * * Matteawan state hospital is to be used for the purpose of holding in custody and caring for such mentally ill persons held under any other than a civil process as may be committed to the said institution by courts of criminal jurisdiction, or transferred thereto by the commissioner of mental hygiene, and for such persons as may be committed thereto pursuant to the provisions of section eighty-five of the mental hygiene law, * * * and for all female convicts becoming mentally ill while undergoing sentence. When a person is committed to the Matteawan state hospital under the provisions of * * * section eighty-five of the mental hygiene law, a copy of the minutes of the proceedings instituted to determine his mental condition shall be furnished to said hospital. The department of correction shall have the jurisdiction and control of such hospital; but it shall be subject to visitation and inspection of the head of the department of mental hygiene, by himself and his authorized representations from the department of mental hygiene."

§ 402. *Superintendent*

The commissioner of correction shall, whenever there is a vacancy, appoint a medical superintendent for the Mat-

teawan state hospital, who shall be in the competitive class of the civil service and be a well-educated physician of at least five years' actual experience in a hospital for the care and treatment of the mentally ill. * * *"

"§ 405. *Powers and duties of superintendent and assistants*

The superintendent shall be the chief executive officer of the hospital and shall:

1. Have the general superintendence of the building and grounds, * * *.

2. Give, from time to time, such orders and instructions as he may deem best calculated to insure good conduct, fidelity and economy in every department of the hospital.

3. Maintain salutary discipline among all who are employed by the institution, and enforce strict compliance with all instructions and orders given by him, and uniform obedience to all the rules and regulations of the hospital."

"§ 408. *Commitment of mentally ill prisoners to the Matteawan state hospital*

1. Whenever the physician of the state prison for women, any county penitentiary, county jail or workhouse, any reformatory for women, or of a state reformatory or any other correctional institution, shall report in writing to the warden or other officer in charge thereof, that any person undergoing a sentence of one year or less or convicted of a misdemeanor, or adjudicated to be a youthful offender, wayward minor or juvenile delinquent, or any

female prisoner confined therein is, in his opinion, mentally ill, such warden or other officer shall apply to a judge of a court of record to cause an examination to be made of such person by two examining physicians, other than a physician connected with such [institution] * * *. Such physicians shall be designated by the judge to whom the application is made. An examining physician, within the meaning of this article, is a physician possessing the qualifications prescribed by the provisions of section two of the mental hygiene law. Such physicians, if satisfied, after a personal examination, that such prisoner is mentally ill, shall make a certificate to such effect.

* * *

2. Upon such certificate of the examining physicians being so made, it shall be delivered to the warden or other officer in charge, who shall thereupon apply by petition forthwith to a judge of a court of record, annexing such certificate to his petition, for an order committing such convict to the Matteawan state hospital. Upon every such application for such an order of commitment, notice thereof in writing, of at least three days, together with a copy of the petition, shall be served personally upon the alleged mentally ill person, and in addition thereto such notice and copy of the petition shall be served upon either the wife, the husband, the father or mother or other nearest relative of such alleged mentally ill person, if there be any such known relative within the state; and if not, such notice shall be served upon any known friend of such alleged mentally ill person within the state. If there be no such known relative or friend within the state, the giving of such notice shall be dispensed with, but in such case the

petition for the commitment shall recite the reasons why service of such notice on a relative or friend of the alleged mentally ill person was dispensed with, and in such case the order for commitment shall recite why service of such a notice on a relative or friend of the alleged mentally ill person was dispensed with.

3. The judge to whom such application for the commitment of the alleged mentally ill person is made may, if no demand is made for a hearing in behalf of the alleged mentally ill person, proceed forthwith on the return day of such notice to determine the question of mental illness, and if satisfied that the alleged mentally ill person is mentally ill, may immediately issue an order for the commitment of such alleged mentally ill person to the Matteawan state hospital.

4. Upon the demand for a hearing by any relative or near friend on behalf of such alleged mentally ill person, the judge shall, or he may upon his own motion where there is no demand for a hearing, issue an order directing the hearing of such application before him at a time not more than five days from the date of such order, which shall be served upon the parties interested in the application and upon such other persons as the judge, in his discretion, may name. Upon such day or upon such other day to which the proceedings shall be regularly adjourned, he shall hear the testimony introduced by the parties and shall examine the alleged mentally ill person, if deemed advisable in or out of court, and render a decision in writing as to such person's mental illness. If such judge cannot hear the application, he may, in his order directing the hearing, name some referee who shall hear the testimony

and report the same forthwith, with his opinion thereon, to such judge, who shall, if satisfied with such report, render his decision accordingly. If it be determined that such person is mentally ill, the judge shall forthwith issue his order committing him to the Matteawan state hospital. Such warden or other officer in charge shall thereupon cause such mentally ill person to be delivered to the superintendent of the Matteawan state hospital and such mentally ill person shall be received into such hospital and retained there until legally discharged. * * * If such judge shall refuse to issue an order of commitment, he shall certify in writing his reasons for such refusal.

5. When an order of commitment is made, such order and all papers in the proceeding shall be presented to the superintendent of the Matteawan state hospital at the time when the mentally ill person is delivered to such institution, and a copy of the order and of each such paper shall be filed with the department of mental hygiene and also in the office of the county clerk of the county wherein the court is located which made the order of commitment. The judge shall order all such papers so filed in the county clerk's office to be sealed and exhibited only to parties to the proceedings, or someone properly interested, upon order of the court."

"§ 409. *Disposal of mentally ill prisoners after expiration of term of imprisonment and any other patients who are neither prisoners nor charged with crimes*

Whenever any prisoner in the Matteawan state hospital shall continue to be mentally ill at the expiration of the term for which he was sentenced, he may be retained there-

in until he has recovered or is otherwise legally discharged. The superintendent of such hospital may discharge and deliver any patient whose sentence has expired, and who is still mentally ill, but who, in the opinion of the superintendent is reasonably safe to be at large, to his relatives or friends who are able and willing to comfortably maintain him, without further public charge; * * * The superintendent of such hospital may discharge any other patient who is not a prisoner, although such patient is still mentally ill, but who, in the superintendent's opinion, is reasonably safe to be at large or is recovered, * * *. Any such patient who has not recovered may, upon the order of the commissioner of correction with the consent of the commissioner of mental hygiene, be transferred to any appropriate mental institution in the department of mental hygiene as may be approved by the heads of such departments. * * * Any prisoner in the Matteawan state hospital, whose term of imprisonment has expired by commutation or otherwise, and who is not recovered may, upon an order of the commissioner of correction with the consent of the commissioner of mental hygiene, be transferred to any institution for the mentally ill."

"§ 410. *Prisoners on recovery to be transferred to prison*

Whenever any prisoner, who shall have been confined in such hospital as a mentally ill person, shall have recovered before the expiration of his sentence, and the superintendent shall so certify in writing to the agent and warden or other officer in charge of the institution, from which such prisoner was received or to which the commissioner of correction may direct that he be transferred, such prisoner

shall forthwith be transferred to the institution from which he came by the superintendent of the hospital, or if received from one of the state prisons, to such state prison as the commissioner of correction may direct * * *. Any inmate not a prisoner, held upon an order of a court or judge, in a criminal proceeding, may be discharged therefrom, upon the superintendent's certificate of recovery, made to and approved by such court or judge.

Any prisoner, before or after expiration of sentence, who, in the opinion of the superintendent, is a mental defective and who does not show evidence of mental illness, may be transferred by the commissioner of mental hygiene on an application made by the superintendent, accompanied by a certificate of mental defect made by two examining physicians, or by an examining physician and a certified psychologist, as defined in the mental hygiene law. Any inmate held on the order of a court or judge in a criminal proceeding who, in the opinion of the superintendent, is a mental defective and who does not show evidence of mental illness may be transferred by the commissioner of correction to the Eastern Correctional Institution, on the application of the superintendent accompanied by a certificate of mental defect executed by two examining physicians, or by an examining physician and a certified psychologist. When such a transfer is made the superintendent shall notify in writing the district attorney of the county from which the inmate was committed and the clerk of the court making the commitment, who shall make proper record thereof. After the transfer of any such inmate he may be returned to the said hospital upon the order of the commissioner of correction, whenever in his judgment

it shall appear that the said inmate is not a proper person to be detained in a state institution for mental defectives. The order of such commissioner directing the return of such inmate shall state the reasons for such return."

Appendix C

RELEVANT PROVISIONS OF THE NEW YORK MENTAL HYGIENE LAW.

"§ 2. *Definitions*

4a. 'Hospital' means a state hospital or psychiatric in-patient facility in the department, a psychiatric facility maintained by a political subdivision of the state for the care and treatment of the mentally ill, a general hospital * * * approved by the commissioner * * *.

10. An 'epileptic' * * * is a person suffering from epilepsy as defined in medical practice, to such an extent that for his own welfare and the welfare of others, or of the community, he requires care and treatment in an institution.

18. * * * 'examining physician' whenever used * * * by the department of mental hygiene or the department of correction, shall mean a reputable physician, duly licensed to practice medicine in this state, who shall have been in the actual practice of his profession for at least three years, and any such physician shall be authorized to make examinations as provided in [the mental hygiene law] and the correction law."

Appendix C.

"§ 3. *Department of mental hygiene; commissioner*

* * * The head of the department shall be the commissioner of mental hygiene * * *. He shall be a reputable physician, duly licensed to practice medicine in the state of New York, who shall have at least ten years' experience in the practice of his profession confined wholly or substantially to the care and treatment of persons suffering from nervous and mental disorders, of which at least five years shall have been as administrative head of a public institution for the care and treatment of persons afflicted with nervous and mental disorders * * *."

"§ 5. *Office of the department; officers and employees*

* * *

The commissioner may * * * appoint and remove in accordance with law and any applicable rules of the state civil service commission such officers and employees as he may deem necessary for the efficient administration of the department.

* * * the positions of assistant director, associate director, director and senior director in any of the institutions under the jurisdiction of the state department of mental hygiene or in Matteawan state hospital or in Dannemora state hospital may be filled by promotion from among the employees of the institutions of such state department and Matteawan state hospital and Dannemora state hospital, who possess the minimum qualifications for such promotions as prescribed by the state civil service commission. The eligible list resulting from a promotion examination * * * shall not be subdivided on the basis of the institution or department in which the persons on

such eligible list are employed, notwithstanding the fact that employees of Matteawan state hospital and Dannemora state hospital are subject to the jurisdiction of the state department of correction, but shall be certified * * * to fill vacancies in such positions in any of the institutions under the jurisdiction of the state department of mental hygiene or in Matteawan state hospital and Dannemora state hospital. The names of persons on such an eligible list shall be certified in the order of their final earned ratings on examination, without regard to the institution or department in which they are employed."

"§ 7. *General powers and duties of commissioner and department*

* * *

8. The commissioner or any authorized representative of the department may visit, examine, inspect and investigate any state institution * * * in which the mentally ill and persons suffering from any mental disease or defect receive care and treatment, and for such purpose the commissioner or such representative is empowered to subpoena witnesses, compel their attendance, administer oaths to witnesses, examine witnesses under oath, and require the production of any books or papers * * *."

"§ 10-a. *Transfer of patients*

1. A patient admitted to an institution or hospital * * * may be transferred from a hospital, * * * to any other institution or facility in the department, or to any such hospital, or to the veterans administration or the United States public health service for treatment of mental illness * * * when deemed in the interest of the patient

and of the institution or facility or such hospital affected, upon the formal order in writing of the commissioner. * * *"

"§ 11. *Control of state institutions within the department*

1. The department of mental hygiene shall have the professional jurisdiction, supervision and control of the state hospitals * * * established for the care and treatment of the mentally ill, but not including Matteawan nor Dannemora state hospitals. As to the Matteawan and Dannemora state hospitals, the powers of the department shall be limited to aiding the head of the department of correction in exercising his powers and duties under the constitution, and under sections twenty, twenty-one and twenty-three * * *, and provisions of law expressly applying to such hospitals. * * *"

"§ 15. *Regulations in respect to the correspondence of patients*

The commissioner shall make such regulations in regard to the correspondence of the patients in institutions and hospitals as in his judgment will promote their interests * * *. All such patients shall be allowed to correspond without restriction with any public official and with the mental health information service."

"§ 20. *Record of patients and inmates*

The department shall keep in its office * * * such information from the case record of each patient * * * admitted to an institution within the department or to a hospital, as the rules and regulations of the commissioner

may prescribe or as may be required by article five of this chapter, * * * and reports of examinations of others made by any division or bureau of the department. The record of each patient shall show:

1. The name, residence, sex, age, nativity, occupation, civil condition and date of admission of every patient in custody in the several institutions for the care and treatment of mentally ill, epileptic and mental defective persons in the state."

"§ 21. *Institutions and hospitals to furnish information to department*

* * * the authorities of the several institutions and hospitals * * * shall furnish to the department the facts mentioned in [section twenty] and such other obtainable facts * * * as the department may, from time to time, in the just and reasonable discharge of its duties, require of them, with the opinion of the director thereon, if requested. The director of any hospital * * * must * * * after the admission of a person * * * cause a true copy of the application and medical certificate on which such person shall have been received * * * to be made and forwarded to the department; and when a patient shall be discharged, transferred or shall die * * * such director shall send the information to the department * * *"

"§ 23. *Deportation and removal of alien and non-resident mentally afflicted persons; powers and duties of the commissioner.*

* * *

5. The commissioner or his representative upon the request of any mentally ill * * * or epileptic person, or

upon the written consent of his relatives, legal representatives or qualified friends, may remove such patient * * * to any other state or place in which he may properly belong."

"§ 70. *Admission procedures; general requirements*

1. Any person alleged to be mentally ill to a degree which warrants hospitalization in a hospital * * * may be admitted to and received and retained as a patient in a hospital by compliance with any one of the following admission procedures * * *:

* * *

(c) on certificates of two physicians.

(d) on certificate of one physician.

* * *

2. The commissioner of mental hygiene shall prescribe and furnish forms for use in procedures for admission and admission shall be had only upon such forms. A mentally ill person shall be admitted only to a hospital or facility designated by the commissioner, or the jurisdiction of the department, pursuant to administrative order authorized by law or pursuant to authorization or order of a court of competent jurisdiction or to the Matteawan state hospital, or Dannemora state hospital * * *. No * * * epileptic shall be received and retained in a state hospital unless such person shall be mentally ill.

* * *

4. Certificates * * * must show that the person is mentally ill and, if required to be made by one or two examining physicians, that such physicians made an examination

of the person alleged to be mentally ill within ten days next before and inclusive of the date of admission unless otherwise provided * * *. The date of the certificate shall be the date of such examination. * * * All certificates shall contain the facts and circumstances upon which the judgment of the physicians is based and shall show that the condition of the person examined is such as to require care and treatment in a hospital and such other information as the commissioner may by regulation require."

"§ 72. *Admission on certificate of two physicians*

1. The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment upon the certificate or certificates of two examining physicians accompanied by an application for the admission of such person executed within ten days prior to such admission * * * in the case of the admission of any such person to a hospital operated by the state or a political subdivision thereof, by the director of such hospital. Such application shall contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based, * * *. The director of the hospital where such person is brought shall cause such person to be examined forthwith by a staff physician of such hospital other than the original examining physicians whose certificate or certificates accompanied the application, and if such person is found to be in need of care and treatment he may be admitted thereto as a patient as herein provided. Such original examining physician may be the director or staff member of a hospital operated or maintained by the state or a

political subdivision thereof to which it is proposed to admit such person, provided, however, that in case of admission of such person to a hospital operated by the state only one such examining physician may be on the staff thereof, and in the case of admission of such person to a hospital operated or maintained by a political subdivision of the state both such examining physicians may be on the staff thereof * * *.

2. The director shall cause written notice of such application to be given the person alleged to be mentally ill not later than five days, excluding Sunday and holidays, after such admission and such notice shall set forth such person's rights under the provisions of this section. At the same time such notice shall also be given to the mental health information service and personally or by mail to the nearest relative of the person alleged to be mentally ill other than the petitioner if there be any such person known to the director, and to as many as three additional persons if designated in writing by the person alleged to be mentally ill to receive such notice.

3. If at any time prior to the expiration of sixty days from the date of admission of such patient, he or any relative or friend or the mental health information service gives notice in writing of request for hearing on the question of need for hospitalization to the director, a hearing shall be held as herein provided. The patient or person requesting a hearing on behalf of the patient may designate the county where the hearing shall be held, which shall be either in the county where the hospital is located, the county of the patient's residence or the county in which the hospital to which the patient was first admitted is located and such hearing shall be held in the county so

designated, subject to application by any interested party, including the director, for change of venue to any county because of the convenience of parties or witnesses or the condition of the patient. It shall be the duty of the director upon receiving notice of such request for hearing to forward forthwith a copy of such notice with a record of the patient as defined and described in section twenty of this chapter to a court of record in the county designated by the applicant, if one be designated, or if no designation be made, then to a court of record in the county where such hospital is located. A copy of such notice and record shall "also" be given the mental health information service. The court which receives such notice shall fix the date of such hearing at a time not later than five days from the date such notice is received by the court and cause the patient or other person requesting the hearing, the director, the mental health information service and such other persons as the court may determine to be advised of such date. Upon such date, or upon such other date to which the proceeding may be adjourned, the court shall hear testimony and examine the person alleged to be mentally ill, if it be deemed advisable in or out of court, and shall render a decision in writing as to the mental illness and the need for retention of the patient. If it be determined that the patient is mentally ill and in need of retention for care and treatment, the court shall forthwith issue an order authorizing the retention of such patient for care and treatment in the hospital for a period not to exceed six months from the date of the order or if the patient is in "a" psychiatric hospital maintained by a political subdivision of the state or in a general hospital the court may order the patient transfered to the jurisdiction of the department for

retention in a hospital operated by the state designated by the commissioner or to a licensed private institution for retention therein for a period not to exceed six months from the date of such order. If, however, it appears that such mentally ill person is harmless and his relatives or a committee of his person are willing and able properly to care for him, at some place other than a hospital, then, upon their written consent, the court may order the transfer of the patient to the care and custody of such relatives or such committee. If the court cannot hear the application it may appoint a referee to hear and report forthwith the testimony with his opinion thereon, to the court, which if satisfied with such report shall issue its order in accordance with this subdivision.

4. If the court shall order the release of the patient, it shall state in writing its reasons for such order and such patient shall forthwith be released.

5. The department or the director of the hospital authorized to retain or receive and retain such patient, as the case may be, shall be immediately furnished with a copy of the order of the court and, if a transfer is ordered, shall immediately make provisions for the transfer of such patient."

"§ 73. *Court authorization to retain a patient*

1. If no application for a hearing shall have been made by a patient or by anyone on behalf of such patient within sixty days of the initial admission of such patient pursuant to this article, and if the director shall determine that the condition of such patient requires his continued retention in a hospital, he shall, if such patient does not

agree to remain in such hospital as a voluntary or informal patient, prior to the expiration of sixty days from the initial admission of such patient, apply to a court of record in the county where the hospital is located for an order authorizing continued retention of such patient or for his transfer to an appropriate hospital and continued retention. The director shall cause written notice of such application to be given the patient and a copy thereof shall be given personally or by mail to the persons required by section seventy-two of this article to be served with notice of such patient's initial admission and to the mental health information service. If no application is made for a hearing on behalf of the patient within five days, excluding Sunday and holidays, from the date such notice of such application was given such patient, and if the mental health information service has not requested a hearing, the court receiving the application may, if satisfied that the patient requires continued retention for care and treatment, or transfer and continued retention, immediately issue an order authorizing continued retention of such patient in such hospital for a period not to exceed six months from the date of the order or if such patient is in a psychiatric hospital operated by a political subdivision of the state or in a general hospital, such order may direct the transfer of such patient to the jurisdiction of the department for retention in a hospital operated by the state or to a licensed private institution, to be retained therein for a period not to exceed six months from the date of such order.

2. Upon the demand of the patient or of anyone on his behalf or upon request of the mental health information service, the court shall, or may on its own motion,

fix a date for the hearing of the application, in like manner as is provided for hearings in subdivision three of section seventy-two of this article. The provisions of such subdivision shall apply to the procedure for obtaining and holding a hearing and to the granting or refusal to grant an order of retention by the court, except that the patient shall not have the right to designate initially the county in which the hearing shall be held.

3. If the director of a hospital in which a patient is retained pursuant to section seventy-two or subdivisions one or two of this section shall determine that the condition of such patient requires his further retention in a hospital, he shall, if such patient does not agree to remain in such hospital as a voluntary or informal patient, apply during the period of retention authorized by the last order of the court, to a court of record in the county where the hospital is located, for an order authorizing further continued retention of such patient. The procedures for obtaining any order pursuant to the subdivision shall be in accordance with the provisions of subdivisions one and two of this section. The period for continued retention pursuant to the first order obtained under this subdivision shall authorize further continued retention of the patient for not more than one year and the period for the further continued retention of the patient authorized by any subsequent order under this subdivision shall be for periods not to exceed two years each."

"§ 74. *Review of court authorization to retain a patient*

If a person whose retention, continued retention or transfer and continued retention has been authorized pur-

suant to this article, or any relative or friend in his behalf, be dissatisfied with any such order he may, within thirty days after the making of any such order, obtain a rehearing and a review of the proceedings already had and of such order, upon a petition to a justice of the supreme court other than the judge or justice presiding over the court making such order, who shall cause a jury to be summoned as in the case of proceedings for the appointment of committee for a mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the patient so authorized to be retained, in the same manner as provided in said proceedings. Any such patient or the person applying on his behalf for such review may waive the trial of the fact by a jury and consent in writing to trial of such fact by the court. If such petition for rehearing and review be made by any other than the person so authorized to be retained or the father, mother, husband, wife or child of such person or the person with whom the person so authorized to be retained was residing at the time of the making of such order authorizing continued retention or accustomed to reside, before such rehearing or review shall be had, the petitioner shall make a deposit or give a bond, to be approved by a justice of the supreme court, for the payment of the costs and expenses of such rehearing, review and determination of the question of mental illness by a jury as aforesaid, if the order authorizing continued retention is sustained. If the verdict of the jury, or the decision of the court when jury trial has been waived, be that such person is not mentally ill, the justice shall forthwith discharge him, but if the verdict of the jury, or the decision

of the court where a jury trial has been waived, be that such person is mentally ill, the justice shall certify that fact and make an order authorizing continued retention under the original order. Such order shall be presented, at the time of authorization of continued retention of such mentally ill person, to, and filed with, the director hospital in which the mentally ill person is authorized to be retained, and a copy thereof shall be forwarded to the department by such director and filed in the office thereof. Proceedings under the order shall not be stayed pending an appeal therefrom, except upon an order of a justice of the supreme court, and made upon a notice and after a hearing, with provisions made therein for such temporary care or confinement of the alleged mentally ill person as may be deemed necessary. If a judge or justice shall refuse to grant an application for an order authorizing continued retention of a mentally ill person proved to be dangerous to himself or others, he shall state his reasons for such refusal in writing, and any person aggrieved thereby may obtain a rehearing and review and the determination of the question of mental illness by a jury in the same manner and under like conditions as from an order authorizing continued retention."

"§ 75. *Admission on certificate of one physician*

The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment, who does not object thereto, upon an application made as provided in section seventy-two of this article, accompanied by a certificate of one examining physician, provided, however, that the need for hospitalization shall be confirmed by the hospital.

Within fifteen days after such admission, if such patient is to be retained for care and treatment beyond such time, and such patient does not agree to remain in such hospital as a voluntary or informal patient, the certificate of another examining physician, supporting the application, shall be filed with the hospital. Such other examining physician may be a physician on the staff of a hospital other than a licensed private institution. From the time of his admission under this section the retention of such patient for care and treatment shall be subject to the provisions for notice, hearing, review and judicial approval of continued retention, or transfer and continued retention as provided in sections seventy-two, seventy-three and seventy-four of this article provided that for the purposes of such provisions the date of admission of the patient shall be deemed to be the date when the patient was first received in the hospital under this section."

"§ 85. *Proceedings for certification to Matteawan state hospital of certain dangerous mentally ill patients of state hospitals in the department*

1. The director of any state hospital, upon order of the commissioner, upon ascertaining that any person, duly admitted to and a patient of such hospital as a mentally ill person, has committed or is liable to commit an act or acts which if committed by a sane person would constitute homicide or felonious assault, or is so dangerously mentally ill that his presence in such a hospital is dangerous to the safety of other patients therein, the officers or employees thereof, or to the community, shall forthwith make application to a court of record or judge thereof within the county wherein such state hospital is located or a justice

of the supreme court in the judicial district wherein such county is located to cause an examination to be made of such person by two examining physicians, other than a physician connected with such state hospital. Such physicians shall be designated by the judge to whom the application is made. Such physicians, if satisfied, after a personal examination, that such patient has committed or is liable to commit an act or acts which if committed by a sane person would constitute homicide or felonious assault, or is so dangerously mentally ill that his presence in such hospital is dangerous to the safety of other patients therein, the officers or employees thereof, or to the community, shall make a certificate to such effect.

2. Upon such certificate of the examining physicians being so made, it shall be delivered to the director or other officer in charge who shall thereupon apply by petition forthwith to a judge of a court of record, annexing such certificate to his petition, for an order certifying such patient to the Matteawan state hospital. Upon every such application for such order of certification, notice thereof in writing, of at least three days together with a copy of the petition, shall be served personally upon the alleged dangerously mentally ill person, and in addition thereto such notice and a copy of the petition shall be served upon either the wife, husband, the father or mother or other nearest relative of such alleged dangerously mentally ill person, if there be any such known relative within the state; and if not, such notice shall be served upon any known friend of such alleged dangerously mentally ill person within the state. If there be no such known relative or friend within the state, the giving of such notice shall be dispensed with, but in such case the

petition for the certification shall recite the reasons why service of such notice on a relative or friend of the alleged dangerously mentally ill person was dispensed with, and in such case the order for certification shall recite why service of such a notice on a relative or friend of the alleged dangerously mentally ill person was dispensed with.

3. The judge to whom such application for the certification of the alleged dangerously mentally ill person may, if no demand is made for a hearing on behalf of the alleged dangerously mentally ill person, proceed forthwith on the return date of such notice to determine the question of the dangerous mental illness of such person, and if satisfied that the alleged dangerously mentally ill person is dangerously mentally ill, may immediately issue an order for the certification of such alleged dangerously mentally ill person to the Matteawan state hospital.

4. Upon the demand for a hearing by any relative or near friend on behalf of such alleged dangerously mentally ill person, the judge shall, or he may upon his own motion where there is no demand for a hearing, issue an order directing the hearing of such application before him at a time not more than five days from the date of such order, which shall be served upon the parties interested in the application and upon such other persons as the judge, in his discretion, may name. The person whose dangerous mental illness is being inquired into may be represented by counsel in any such proceedings. Upon such day or upon such other day to which the proceedings shall be regularly adjourned, he shall hear the testimony introduced by the parties and shall examine the alleged dangerously mentally ill person, if deemed advisable in or out of court, and render

a decision in writing as to such person's dangerous mental illness. If such judge cannot hear the application, he may, in his order directing the hearing, name some referee who shall hear the testimony and report the same forthwith, and his opinion thereon, to such judge, who shall, if satisfied with such report, render his decision accordingly. If it be determined that such person is dangerously mentally ill, the judge shall forthwith issue his order committing him to the Matteawan state hospital. Such director or other officer in charge shall thereupon cause such dangerously mentally ill person to be delivered to the superintendent of the Matteawan state hospital and such dangerously mentally ill person shall be received into such hospital and retained there until he is no longer dangerous to safety whereupon he may be released as provided in the correction law or he may be transferred to any hospital in the department upon the order of the commissioner. Such director or other person in charge before delivering such dangerously mentally ill person shall see that he is bodily clean. If such judge shall refuse to issue an order of certification, he shall certify in writing his reasons for such refusal.

5. Certification to Matteawan state hospital pursuant to this section shall not be deemed as or received in any court in evidence of commission of a crime by the person so certified, nor shall such certification be deemed or considered a certification as punishment for a crime."

"§ 86. *Investigation into the care and treatment of the mentally ill*

When the commissioner has reason to believe that any person alleged or adjudged to be mentally ill is wrongfully

deprived of his liberty, or is cruelly, negligently or improperly treated, or inadequate provision is made for his skillful medical care, proper supervision and safe keeping, he may ascertain the facts, or may order an investigation of the facts by the department. He, or the representative of the department conducting the proceeding, may issue compulsory process for the attendance of witnesses and the production of papers, and exercise the powers conferred upon a referee in the supreme court. If the commissioner deem it proper, he may issue an order directed to any or all institutions, directing and providing for such remedy or treatment, or both, as shall be therein specified.

If such order be just and reasonable, and be approved by a justice of the supreme court, who may require notice to be given of the application for such approval, it shall be binding upon any and all institutions and persons to which it is directed, and any willful disobedience of such order shall be a criminal contempt and punishable as such. Whenever the commissioner shall undertake an investigation into the general management and administration of any institution for the mentally ill, he may give notice to the attorney-general of any such investigation, and the attorney-general shall appear personally or by deputy and examine witnesses who may be in attendance. The commissioner, or his representatives from the department, may at any time visit and examine the patients of any county or city public home, to ascertain if mentally ill persons are kept therein."

"§ 87. *Discharge of patients*

1. The director of a hospital, * * * may discharge any patient, except one held upon an order of a court or judge

having criminal jurisdiction in an action or proceeding arising out of a criminal offense at any time, * * *:

* * *

3. Discharge of certain patients committed under correction law. The commissioner shall discharge any patient committed to his custody pursuant to section three hundred eighty-four of the correction law who, in his judgment, is recovered. The commissioner shall also discharge any such patient who is not recovered, but whose discharge, in the judgment of the commissioner, will not be detrimental to the public safety or welfare, or injurious to the patient. When the commissioner is unwilling upon request to certify to the discharge of a patient committed to his custody pursuant to section three hundred eighty-four of the correction law, and so certifies in writing, giving his reasons therefor, such patient may make application for his discharge to a court of record in the judicial district of the institution in which the patient is placed. Upon a written finding by the court that there is reasonable cause to believe that the application has merit, the court may appoint two qualified disinterested psychiatrists to examine such patient, to report within sixty days, or such longer period as the court determines to be necessary for the purpose, their opinion as to his mental condition. The court may call for the presentation of such other evidence, written or oral, as it may consider necessary for the proper disposition of the application. If, on the basis of the report of such psychiatrists and such other evidence, the court is satisfied that the discharge or conditional release of such patient will not be detrimental to the public safety or welfare or injurious to the patient, it shall order his discharge,

or his release on such conditions as it shall determine to be necessary. If, within five years after the conditional release of any such patient, the court shall determine that for the safety of such person or the safety of others his conditional release should be revoked, the court shall forthwith order him recommitted to the custody of the commissioner of mental hygiene and such recommitment shall be deemed to be a commitment to the custody of the commissioner of mental hygiene pursuant to section three hundred eighty-four of the correction law. All patients suitable for discharge or release under this subdivision may be granted a convalescent status in accordance with rules prescribed by the commissioner."

"§ 88. *Mental health information service*

There is hereby created and established a mental health information service of the state of New York in each judicial department of the supreme court. The head of such service in each judicial department, and such assistants and such staff as may be necessary, shall be appointed and be removable by the presiding justice of the appellate division of such judicial department. Appointments and transfers to such service shall comply with the provisions of the civil service law and except for the head of such service in each judicial department all such positions shall be in the competitive class of the civil service. Standards for qualifications of the personnel in such service having duties requiring direct contact with patients and their immediate families shall be established in agreement with the commissioner. The mental health information service in each judicial department of the state shall perform the following duties subject to directions made and rules and

regulations promulgated by the presiding justice of the appellate division of such department;

(a) study and review the admission and retention of involuntary patients;

(b) inform such patients and in proper cases others interested in the patients' welfare concerning procedures for admission and retention and of the patients' right to have judicial hearing and review, to be represented by legal counsel and to seek independent medical opinion;

(c) in any case before a court, to assemble and provide the court with all the relevant information as to the patient's case, his hospitalization, his right to discharge, if any, including information from which the court may determine the need, if any, for the appointment of counsel for the patient or the obtaining of additional psychiatric opinion;

* * *

(e) provide such services and assistance to patients and their families and to the courts having duties to perform relating to the mentally ill or alleged mentally ill as may be required by a judge or justice thereof and in accordance with the regulations of the presiding justice of the appellate division of each such judicial department."

"§ 100. *Jurisdiction over incompetents and patients*

* * * 'patient' shall mean a person who has been lawfully committed or admitted to any institution in the department of mental hygiene or to any institution for the mentally ill or mentally defective in the department of correction. * * *"

Appendix C.

"§ 426. *Habeas corpus*

Any one hospitalized as a mentally ill person * * * is entitled to a writ of *habeas corpus,* upon a proper application made by him or some relative or friend in his behalf. Upon the return of such writ, the fact of his mental illness * * * shall be inquired into and determined. The medical or other history of the patient, as it appears in the institutional or hospital record, shall be given in evidence, and the director of the institution or hospital wherein such person is held in custody, or hospitalized and any proper person, shall be sworn touching the condition of such person. Where a second or subsequent application is made for the discharge from custody or from a hospital of the same person, any party to the proceeding may introduce in evidence any testimony, in relation to the condition of such patient, received upon any formal hearing or trial, together with all the exhibits introduced in evidence upon such hearing or trial in connection with such testimony without calling the witnesses who gave such testimony, such evidence to have the same force and effect as if witnesses had been called. In the case of an allegedly mentally ill person such application may be to a court of record in the county from which he was admitted or in the county in which the hospital is located. Any interested party, including the hospital may apply to change the place of hearing the application to any other county in order to serve the convenience of the parties or the condition of the patient. The director shall forthwith notify the mental health information service of any such application for a writ and provide it with information as to the case and nature of hospitalization and the condition of the patient."

Appendix D

(Descriptive Pamphlet Distributed to All Visitors)

DANNEMORA STATE HOSPITAL

Dannemora State Hospital was opened in 1900, as
of the New York State Department of Correction, and
ceives convicted male felons who became mentally ill w
serving their sentences. Patients are received from
the prisons in New York State, as well as Eastern
rectional Institution at Napanoch, Elmira Reformatory
Elmira Reception Center.

Attention is called to the fact that this is a hospital
not a prison. Within limits of necessary security, ev
effort is made to maintain an atmosphere which will
the patients recover from their mental illnesses. For
most part, they are cared for on open dormitories, and
in individual cells as identified with a prison.

Upon recovery from mental illness, the patient is tr
ferred back to prison, or to the institution from which
was originally transferred.

Under a law which became effective in 1961, a patient
has not recovered by the time his sentence expires, is c
mitted to the custody of the Commissioner of the Dep
ment of Mental Hygiene. He is retained here, howe
until he is sufficiently well to be considered for transfe
one of the hospitals in that Department, such as St. L
rence State Hospital, Marcy State Hospital, etc.

Occasionally, patients are also considered, after the
piration of their sentences, for transfer to Veterans
pitals, or to hospitals in their home states. Considera
is also given to release to the custody of relatives if

patient's condition is satisfactory, proper care is assured, etc.

We utilize all the recognized forms of treatment, including individual and group psychotherapy, group counseling, shock therapy, occupational therapy, and recreational therapy. We also make extensive use of tranquillizing drugs with excellent results. These drugs result in recovery of many of our patients, while others have been greatly improved in their behavior pattern and habits. We expend $27,500 a year for these medications.

Through successful application of modern treatment methods, our hospital has shown a steady increase in discharge rate. In 1964, we admitted 160 patients and discharged over 180. Our current population is about 1070.

The institution lands consist of the farm (operation of which was discontinued in 1961), the main hospital tract of 134 acres and adjoining wood and pasture lands which bring the total to 1339 acres.

The total monies spent for operating the institution last year, excluding Capital Construction, was $3,533,452. This is a total annual per capita cost, based on 1078 patients of $3,309 of which $2,882 was Personal Service, $201 Food, $23.00 Clothing, $32.00 Medical, $12.00 Repairs, etc.

We have a total of 482 payroll items, 379 of which are uniformed employees. Our annual Personal Service expenditure is now over $3,600,000. Payrolls (bi-weekly) average about $123,500.

The daily Food cost per patient is about 55¢.

Appendix E

DANNEMORA STATE HOSPITAL

ADMINISTRATION

Director	1
Assistant Director	2

MEDICAL

Supervising psychiatrist	3
Senior Psychiatrist	2
Senior Dentist	1
Associate Clinical Psychologist	1
Senior X-Ray Technician	1
Pharmacist	1
Senior Laboratory Technician	1
Correction Hospital Head Nurse	7

OCCUPATIONAL THERAPY

Senior Occupational Therapist	1
Occupational Therapist	2
Occupational Therapy Instructor	1
Occupational Therapy Aides	1

SUPERVISION OF PATIENTS

Security Supervisor	1
Correction *Hospital* Chief Officer	1
Correction *Hospital* Supervising Officer	5
Correction *Hospital* Charge Officers	25
Correction *Hospital* Senior Officers	52
Correction *Hospital* Officers	291

Please note that "Hospital" is emphasized in the title structure.

Appendix E.

To be contrasted in the Prisons with Captains, Lieutenants, Sergeants and Correction Officers.

Please note job specification comparisons from attached. These are prepared by the New York State Department of Civil Service. Since the Prison series was printed, titles of Principal Keeper and Assistant Principal Keeper have been changed to Deputy Warden and Assistant Deputy Warden.

Appendix F

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

DANNEMORA STATE HOSPITAL, Dannemora, N. Y.

PER CAPITA COST STATEMENT, showing the population, appropriations, expenditures, unexpended balances and consumption for the fiscal year APRIL 1, 1964 to MARCH 31, 1965

Classification	*Appropriations*	*Expenditures*	*Balances*	*Consumption*	*Per Capita Cost (Consumed Basis)* *Per diem*	*Per ann*
PERSONAL SERVICE MAINT. & OPER.	3,110,183.00	3,106,345.80	3,837.20	3,106,345.80	7.8947	2,881.9
Travel	1,445.00	1,427.57	17.43	1,425.40	.0036	1.3
Automotive	1,005.00	999.18	5.82	973.33	.0025	.9
General Office	2,025.00	2,023.52	1.48	1,944.83	.0049	1.8
Printing & Adv.	625.00	623.77	1.23	520.46	.0013	.4
Communication	7,250.00	7,135.62	114.38	6,702.99	.0170	6.2
Fuel	102,710.00	102,486.94	223.06	102,412.45	.2603	95.0
					(.5508)	(201.0
Food	190,915.00	190,731.92	183.08	221,760.26	.5636	205.7
Clothing	23,240.00	23,238.33	1.67	24,500.54	.0623	22.7
Household	17,370.00	17,366.70	3.30	17,359.73	.0441	16.1
Medical	34,650.00	34,648.02	1.98	34,574.51	.0879	32.0
Farm & Garden	750.00	748.78	1.22	888.47	.0023	.8
Special Supplies	8,975.00	8,967.60	7.40	9,171.18	.0233	8.5
Repairs	11,750.00	11,748.92	1.08	13,321.86	.0339	12.3
Spec Dept Chges	135.00	47.00	88.00	47.00	.0001	.0
Equip-Rep'l	23,390.46	23,390.46	–0–	23,390.46	.0594	21.7
Equip-Add'l	1,521.77	1,521.77	–0–	1,521.77	.0039	1.4
Total M. & O.	427,757.23	427,106.10	651.13	460,515.24	1.1704	427.2
GRAND TOTAL	3,537,940.23	3,533,451.90	4,488.33	3,566,861.04	9.0651	3,308.7

Average inmate population 4/1/64 to 3/31/65	1,078
Average number of personnel receiving maintenance	25
Actual inmate population on March 31, 1965	1,067

Personnel: Maintenance 477

DANNEMOR

Appendix F.

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

MATTEAWAN STATE HOSPITAL, Beacon, N. Y.

PER CAPITA COST STATEMENT, showing the population, appropriations, expenditures, unexpended balances and consumption for the fiscal year APRIL 1, 1964 to MARCH 31, 1965

Classification	*Appropriations*	*Expenditures*	*Balances*	*Consumption*	*Per Capita Cost (Consumed Basis) Per diem*	*Per annum*
Personal Service Maint. & Oper.	6,233,730.00	6,227,702.88	6,027.12	6,227,702.88	9.4266	3,440.72
Travel	5,635.00	4,072.60	1,562.40	4,092.46	.0062	2.26
Automotive	6,155.00	5,856.45	298.55	5,818.67	.0088	3.21
General Office	3,800.00	3,775.26	24.74	3,806.27	.0058	2.10
Printing & Adv.	2,725.00	2,654.54	70.46	2,666.94	.0040	1.47
Communication	15,340.00	15,309.23	30.77	15,274.29	.0231	8.44
Fuel	208,015.00	201,451.72	6,563.28	201,315.60	.3047	111.22
					(.5596	204.26)
Food	279,800.00	278,549.06	1,250.94	381,361.37	.5772	210.70
Clothing	42,340.00	42,203.69	136.31	42,349.91	.0641	23.40
Household	30,575.00	30,559.01	15.99	34,529.50	.0523	19.08
Medical	51,950.00	51,646.32	303.68	51,638.03	.0782	28.53
Farm & Garden	54,335.00	54,063.79	271.21	973.68	.0015	.54
Special Supplies	7,870.00	7,603.31	266.69	7,089.29	.0107	3.92
Repairs	28,495.00	28,426.83	68.17	28,528.45	.0432	15.76
Spec Dept Chges	150.00	127.37	22.63	127.37	.0002	.07
Equip-Rep'l	15,079.67	15,079.67	–0–	15,079.67	.0228	8.33
Equip-Add'l	6,255.46	6,255.46	–0–	6,255.46	.0095	3.46
Total M. & O.	758,520.13	747,634.31	10,885.82	800,906.96	1.2123	442.49
Grand Total	6,992,250.13	6,975,337.19	16,912.94	7,028,609.84	10.6389	3,883.21

Average inmate population 4/1/64 to 3/31/65 1,810
Average number of personnel receiving maintenance 57
Actual inmate population on March 31, 1965 1,735

Personnel: Maintenance 1,000

MATTEAWAN

Appendix F.

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

CLINTON PRISON, Dannemora, N. Y.

PER CAPITA COST STATEMENT, showing the population, appropriations, expenditures, unexpended balances and consumption for the fiscal year APRIL 1, 1964 to MARCH 31, 1965

Classification	*Appropriations*	*Expenditures*	*Balances*	*Consumption*	*Per Capita Cost (Consumed Balances)* *per diem*	*Per annum*
PERSONAL SERVICE MAINT. & OPER.	2,900,250.00	2,897,756.66	2,493.34	2,897,756.66	3.7986	1,38
Travel	3,250.000	2,696.95	553.05	2,605.56	.0034	
Automotive	5,715.00	5,692.90	22.10	4,849.79	.0063	
General Office	2,845.00	2,840.71	4.29	2,655.59	.0035	
Printing & Adv.	3,140.00	3,138.82	1.18	3,022.04	.0040	
Communication	14,400.00	14,279.89	120.11	13,778.03	.0181	
Fuel	158,580.00	158,539.90	40.10	154,732.42	.2028	7
					(.5391)	(19
Food	296,890.00	296,684.25	205.75	412,038.77	.5401	19
Clothing	89,745.00	89,721.96	23.04	88,739.50	.1163	4
Household	32,740.00	32,371.58	368.42	31,339.97	.0411	1
Medical	31,720.00	31,630.41	89.59	31,436.52	.0412	1
Farm & Garden	67,230.00	66,920.61	309.39	283.07	.0004	
Special Supplies	26,590.00	25,423.27	1,166.73	24,150.83	.0316	1
Repairs	25,250.00	25,233.57	16.43	24,771.27	.0325	1
Rentals	2.00	2.00	–0–	2.00	–0–	
Equip-Rep'l	15,379.43	15,379.43	–0–	15,379.43	.0202	
Equip-Add'l	1,593.82	1,593.82	–0–	1,593.82	.0021	
MAINT. UNDIST.						
Inmates' Wages	35,957.91	35,957.91	–0–	35,957.91	.0471	1
Total M. & O.	811,028.16	808,107.98	2,920.18	847,336.52	1.1107	40
GRAND TOTAL	3,711,278.16	3,705,864.64	5,413.52	3,745,093.18	4.9093	1,79

Average inmate population 4/1/64 to 3/31/65 2,090
Average number of personnel receiving maintenance 4
Actual inmate population on March 31,1965 2,087

Personnel: Maintenance 459; Industry 24

CLINT

Appendix F.

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

1964-1965
PER CAPITA COST STATEMENT

Institution	*Food*	*Clothing*	*Household*	*Medical*	*Total M & O*	*Personal Service*	*Grand Total*
Attica Prison	189.57	35.83	16.03	8.60	376.23	1,358.53	1,734.76
Auburn Prison	187.35	31.92	17.24	8.66	380.07	1,500.88	1,880.95
Clinton Prison	197.15	42.46	14.99	15.04	405.42	1,386.49	1,791.91
Green Haven Prison	187.16	29.75	15.67	5.36	385.72	1,267.51	1,653.23
Sing Sing Prison	192.03	48.28	13.81	12.75	447.62	1,618.91	2,066.53
Wallkill Prison	189.52 (201.05)*	33.97	20.64	15.68	520.29	2,643.46	3,163.75
Dannemora St. Hosp.	205.72 (204.26)*	22.73	16.10	32.07	427.20	2,881.58	3,308.78
Matteawan St. Hosp.	210.70 (183.60)*	23.40	19.08	28.53	442.49	3,440.72	3,883.21
Albion St. Tr. School	204.18 (202.67)*	34.05	29.95	37.52	704.47	4,882.03	5,586.50
Westfield State Farm	231.30	31.24	25.68	48.26	700.75	3,977.80	4,678.55
Elmira Reformatory	184.07	33.10	20.07	8.49	467.40	1,827.56	2,294.96
Reception Center	184.09	24.93	15.12	13.54	312.13	1,951.40	2,263.53
Great Meadow Corr.	192.06	29.68	15.20	7.31	404.94	2,072.99	2,477.93
Eastern Corr. Inst.	193.30	40.11	17.90	6.57	436.41	1,908.10	2,344.51
NYS Vocational Inst.	190.78	38.58	21.91	11.69	481.45	2,541.79	3,023.24
Woodbourne Corr. Inst.	190.96	34.36	20.54	7.03	483.01	2,607.78	3,090.79
Camp Pharsalia	336.61	59.45	26.20	6.43	785.84	2,241.60	3,027.44
Camp Monterey	337.84	50.85	26.08	4.59	781.18	2,344.48	3,125.66
Camp Summit	356.79	72.80	28.67	15.35	763.03	2,113.64	2,876.67
Camp Georgetown	346.10	61.81	20.36	5.48	737.16	1,977.12	2,714.28
Average 1964-65	196.78	34.53	17.44	13.99	715.28	2,098.18	2,813.46
Average 1963-64	190.88	34.87	17.05	13.38	668.76	2,019.85	2,688.61
Comparison of current year with last year	+3.1%	—1.	+2.3	+4.5	+6.9	+3.9	+4.6%

*Includes personnel and inmates fed.

All other costs are based upon average inmate population only.

CLASSIFICATION COSTS

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

ALL INSTITUTIONS including MAIN OFFICE

PER CAPITA COST STATEMENT showing the population, appropriations, expenditures, unexpended balances and consumption for the fiscal year APRIL 1, 1964 to MARCH 31, 1965

Classification	*Appropriation*	*Expenditures*	*Balances*	*Consumption*	*Per Capita Cost (consumed basis) Per Diem*	*Per Annum*
PERSONAL SERVICE	41,283,089.00	41,159.955.39	123.133.61	41,159.955.39	$5.7484	2.098.18
MAINT. & OPER						
Travel expenses	73,813.00	65,238.53	8,574.47	65,384.27	.0091	3.33
Automotive	74,208.00	71,225.81	2,982.19	70,233.88	.0098	3.58
General Office	120,035.00	119,143.68	891.32	118,596.83	.0166	6.05
Printing & Adv.	58,280.00	57.020.31	1,259.69	56,871.85	.0079	2.90
Communication	221,973.00	218,931.56	3,041.44	218,803.85	.0306	11.15
Fuel, light, etc.	1,821,005.00	1,805,898.52	15,106.48	1,818,544.08	.2540	92.70
					(.5326	194.40)
Food	3,059,493.00	3,042,026.06	17,466.94	3,860,157.89	.5391	196.78
Clothing	687,265.00	682,938.97	4,326.03	677,454.02	.0946	34.53
Household	330,795.00	329,976.45	818.55	342,032.75	.0478	17.44
Medical	279,070.00	276,304.91	2,765.09	274,370.73	.0383	13.99
Farm & Garden	424,705.00	421,704.64	3,000.36	14,111.74	.0020	.72
Special Supplies	383,210.00	369.994.25	13,215.75	372,172.72	.0520	18.97
Repairs	289,060.00	285,663.35	3,396.65	286,411.14	.0400	14.60
Rentals	2,724.00	2,720.00	4.00	2,720.00	.0004	.14
Special Dept. Chges	285.00	174.37	110.63	174.37	—	.01
Equipment—Replace.	182,818.51	182,818.51	–0–	182,818.51	.0255	9.32
Equipment—Additional	66,136.03	61,430.21	4,705.82	61,430.21	.0086	3.13
Sub-total	8,074,875.54	7,993,210.13	81,665.41	8,422,288.84	1.1763	429.34
ALL INSTITUTIONS						
Spec. Dept. Chges						
Board of Prisoners						
Transport convicts						
Transfer prisoners						

			1,401.30	103,598.70		105,000.00
			8,255.03	91,444.97		99,700.00
			45,617.17	4,171,382.83		4,217,000.00

Maintenance Wages**	293,000.00	285,226.58	7,773.42			
Camp Operations—bal.	1,313.00	–0–	1,313.00			
Dental Laboratory	8,500.00	8,395.69	104.31			
Uniform Allowance	450,000.00	436,950.00	13,050.00			
Sub-total	5,174,513.00	5,096,998.77	77,514.23	5,096,998.77	.7119	259.82
MAIN OFFICE						
State Fair	1,600.00	1,477.79	122.21			
Probation S&E	115,336.00	104,195.67	11,140.33			
Moran Institute	30,125.00	27,498.42	2,626.58			
Ident. Workload	96.630.00	96.101.92	528.08			
Sub-total	243,691.00	229.273.80	14,417.20	229,273.80	.0320	11.69
GENERAL ST. CHGES						
Retired Employees	316,500.00	283,043.93	33,456.07	283,043.93	.0395	14.43
Sub-total, M. & O.	13,809.579.54	13,602,526.63	207,052.91	14,031.605.34	1.9597	715.28
TOTAL, P.S. & M. & O.	55,092,668.54	54,762,482.02	330,186.52	55,191,560.73	7.7081	2,813.46
EXCLUDED FROM COST						
Corr. Ass'n. of N. Y.	1,100.00	1,100.00	–0–			
Foster Homes—Hostels	35,800.00	30,157.53	5,642.47			
Local Ass't—Probation	3,325,618.00	3,033.224.51	292.393.49			
Sub-total	3,362,518.00	3,064,482.04	298,035.96			
GRAND TOTAL	58,455,186.54	57,826,964.06	628,222.48			

Average inmate population for 4/1/64 to 3/31/65 19,617
Personnel (Maintenance 6,323; Industry 199) average receiving maint. 240
Actual inmate population on March 31, 1965 19,323

Total and other classification per capita costs based on average inmates only
* ( ) Food—Per Capita cost based on total inmates and personnel fed.
** Distributed to various institutions.

ALL INSTITUTIONS & MAIN OFFICE

Appendix G

SPECIFICATIONS—NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

Correction Hospital Ward Service Series

Correction Hospital Officer, Grade 11
Correction Hospital Officer (TB Service), Grade 12
Correction Hospital Senior Officer, Grade 12
Correction Hospital Senior Officer (TB Service), Grade 13
Correction Hospital Charge Officer, Grade 13
Correction Hospital Charge Office (TB Service), Grade 14
Correction Hospital Supervising Officer, Grade 16
Correction Hospital Chief Officer, Grade 19
Correction Hospital Security Supervisor, Grade 22

These employees are responsible for the custody and care of patients in a hospital for the criminally insane. The work requires a non-technical knowledge of probable reactions of a variety of psychiatric types of patients, the use of recognized methods and techniques in the care of such patients and initiative, alertness and the ability to deal intelligently with emergencies. There is danger of physical injury to patients and employees from violent patients. Positions involving the care of male patients are open to males only. Those involving the care of female patients to females only. Positions assigned to active tuberculosis wards have a tuberculosis service parenthetic title and are allocated to a higher salary grade in recognition of the hazard of infection. Positions which perform custodial work for other types of patient or inmate populations are classified in the Correction Officer Series, 8700; the Attend-

ant Series, 5540; and the Child and Student Resident Care Series, 8241.

CORRECTION HOSPITAL OFFICER acts as custodian of criminally insane patients and performs duties relating to their physical, medical, and psychiatric care: oversees or personally performs the bathing, dressing, feeding, and general personal care of patients; persuades patients to participate in ward work and to engage in recreational or other activities such as letter writing and reading; supervises patients in keeping beds, quarters, and equipment clean; keeps order and prevents escapes; helps to locate escaped patients; guards against injury to persons or property; takes count of patients; makes periodic and systematic searches of wards and dormitories for contraband; opens and inspects patients' private packages; leads groups of patients in work parties on the grounds, farm, coal yard, and elsewhere in the institution and guards and cares for them while at work; issues and accounts for laundry, linen, clothing, and supplies for a ward or group of wards; keeps simple written records and generally assists his superior; may take temperatures; may ride with the transfer agent or bus driver when patients are to be transported in motor vehicles; serves food and maintains cleanliness in a dining room. A Correction Hospital Officer works under the supervision of a Senior or Charge Officer. QUALIFICATIONS: High school graduation. All candidates must be free from any disabling mental or physical defects and must meet established physical requirements. Male candidates must be at least 21 but less than 37 years old and must be at least 5′ 8″ tall and weigh at least 150 pounds. Female candidates must be at least

21 but less than 46 years old and must be at least 5′ 2″ tall and weigh at least 115 pounds.

CORRECTION HOSPITAL SENIOR OFFICER supervises Correction Hospital Officers in the care and custody of a group of patients in a ward or other subdivision during the evening or night shift: assigns Correction Hospital Officers to various tasks; gives orders and instructions; furnishes advice on methods and techniques of psychiatric attendant care; checks quality of work; prepares daily written reports of the physical and mental condition of patients, transfers, escapes, accidents, and other matters; makes arrangements to give prescribed medications; keeps census and time records; inspects light, heat, ventilation, locks, clothing, equipment, and supplies; takes precautions to prevent disturbances and escapes; assists in looking for escaped patients; personally handles more difficult situations and problems. A Correction Hospital Senior Officer has direct responsibility for the care and welfare of the patients in and the physical upkeep of a ward or other subdivision and has working supervision over lower grade officers. This position is less responsible than the Correction Hospital Charge Officer who is in charge of the day shift in a similar unit when most of the medical, housekeeping and related ward activities take place. QUALIFICATIONS: One year of permanent service as a Correction Hospital Officer.

CORRECTION HOSPITAL CHARGE OFFICER supervises subordinate officers in the care and custody of a group of criminally insane patients in a ward or other subdivision during the day shift or is in charge of a group of wards during a later shift; assigns tasks to Correction Hospital Officers

and working patients; checks quality of work; checks patients when they leave for various activities; gives officers special instructions regarding various patients; prepares daily reports of mental and physical condition of patients and of transfers, escapes, accidents, and other matters; maintains care of personal property of patients; inspects light, heat, ventilation, clothing, equipment, and supplies; requisitions new supplies, replacements, and repairs; makes arrangements for medications as prescribed; maintains precautions against disturbances, escapes, and injury to patients; personally handles difficult situations and problems; where assigned to late shift supervision, assigns subordinates to various wards and makes inspection rounds of wards to check health of patients, quality of work of officers, and physical condition of wards; keeps time records; furnishes advice on methods and techniques of patient care; reviews all ward reports and reports all unusual occurrences. QUALIFICATIONS: One year of permanent service as Correction Hospital Senior Officer.

CORRECTION HOSPITAL SUPERVISING OFFICER on an assigned shift is in responsible charge of a large ward building, or supervises the entire ward service of a criminal hospital when there is no correction hospital chief officer on duty: schedules subordinate officers to assure adequate coverage of ward; inspects ward frequently to review work of subordinate officers, advises on methods and techniques of care and custody and checks the physical condition of the ward; maintains patient census, accident and employees time records; supervises food service; takes precautions to prevent disturbances and escapes: supervises searches for escapees; investigates patients' complaints; reviews reports prepared by subordinate officers; prepares daily reports for the Cor-

rection Hospital Chief Officer. QUALIFICATIONS: One y of permanent service as Correction Hospital Charge ficer.

CORRECTION HOSPITAL CHIEF OFFICER under direct sup vision from the Correction Hospital Security Supervis has charge of the ward service of a criminal hospital: sup vises the assignment of all ward service personnel; assig supervisory personnel to posts of duty and reviews th daily reports; inspects the dining room and all other pla where patients are assigned and handles disciplinary pr lems of ward personnel; confers with the medical st on problems relating to ward service; acts for the Corr tion Hospital Security Supervisor in his absence. QUA FICATIONS: One year of permanent service as Correcti Hospital Supervising Officer or two years of perman service as Correction Hospital Charge Officer.

CORRECTION HOSPITAL SECURITY SUPERVISOR is responsi for planning, developing and directing the security a custodial care programs at a hospital for the crimina insane: plans the assignments of custodial and secur personnel to insure adequate coverage at all times; assig supervisory personnel to posts; makes frequent inspectio including periodic night rounds of the hospital to ch security and custody arrangements; confers with the me cal staff on problems relating to the care and treatment patients; establishes and maintains effective coordinati between the medical staff and uniformed personnel; dire searches for escapees; directs periodic searches of the h pital for contraband; formulates plans and procedures use during fires, riots, escapes or other emergency sit tions; reviews accident reports; confers daily with the rector and assistant director and as necessary with s

ordinate supervisory personnel; directs the training of new security and custodial personnel. A Correction Hospital Security Supervisor reports directly to the Director of Criminal Hospital and is responsible to him for the proper fulfillment of all laws, rules and orders of the Department of Correction concerning security and custody. QUALIFICATIONS: One year of permanent service as Correction Hospital Chief Officer or two years of permanent service as Correction Hospital Supervising Officer.

Revised (December 1964) Series 8716

Appendix H

SPECIFICATIONS—NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

**Correction Officer Series*

*Correction Officer, Grade 11
*Correction Sergeant, Grade 15
*Correction Lieutenant, Grade 18
*Correction Captain, Grade 20
Assistant Principal Keeper, Grade 22
Principal Keeper or (Assistant Superintendent), Grade 25
Warden or (Superintendent)**
Kitchenkeeper, Grade 15

These employees are responsible for the custody and supervision of male inmates in a State prison or reforma-

* These titles effective March 28, 1956.
** The salaries of Warden and Superintendent are established by the Correction Law.

tory. Except for Kitchenkeeper, supervision over each class is received from the next higher grade in the series. Differences in titles and salaries between the classes within this series are based primarily on supervisory and administrative duties and responsibilities. These positions are open to men only.

Positions which perform custodial work for other types of patient or inmate populations are classified in the Correction Matron Series, 8233; the Correction Hospital Ward Service Series, 8716; the Attendant Series, 5540; the Colony Supervisor Series, 5551; and the Children's Supervisor Series, 8262.

Correction Officer has immediate supervision over inmates in cells, shops, and wards, at meals and at work, maintaining discipline, supervising work squads, preventing escapes, and guarding against injury to persons and property, takes periodic counts of inmates; examines contents of vehicles entering or leaving gates; helps locate escaped inmates; reports at intervals to superior officers. He ordinarily exercises no formal supervision over other employees and all duties are performed under supervision from a custodial officer of higher rank. Qualifications: Candidates must be high school graduates between the ages of 21 and 35 and must be free from any disabling mental or physical defect and in addition must be 5′ 8″ tall and weigh at least 155 pounds.

Correction Sergeant supervises a group of Correction Officers on an assigned shift in a subdivision of a prison or reformatory: assigns subordinates to posts of duty and gives orders and instructions; inspects the departments of the prison such as the cell blocks, assembly halls, shops

and yard; takes precautions to prevent disturbances and escapes; participates in the rehabilitation of prisoners; prepares daily reports to his superior officers. A Correction Sergeant performs all duties under the supervision of a higher ranking custodial officer, but handles emergency situations and individual problems as they arise. QUALIFICATIONS: Two years of permanent service as Correction Officer.

CORRECTION LIEUTENANT either (1) supervises the entire custodial service on an assigned shift in a reformatory or a moderate-size prison, or (2) in a large prison is responsible for the custodial service in a subdivision of the institution on an assigned shift. The duties are similar to those of Correction Sergeant but include greater supervisory responsibility and participation in the training courses for new Correction Officers. In reformatories or moderate-sized prisons, Correction Lieutenants are under the supervision of the Principal Keeper or Superintendent, while in large prisons they work under the direction of the Correction Captain who is in charge of the shift throughout the institution. QUALIFICATIONS: One year of permanent service as Correction Sergeant; or one year of permanent service as Kitchenkeeper and two years permanent service as Correction Officer.

CORRECTION CAPTAIN either (1) supervises the entire custodial service on an assigned shift in a large prison, or (2) in a reformatory or smaller prison assists the Assistant Superintendent or Principal Keeper in the administration of the custodial service in addition to supervising one shift. A Correction Captain performs duties similar to Correction Lieutenant, and in addition schedules the as-

signments of Correction Lieutenants, Sergeants and Correction Officers, and in the smaller institutions, where there is no Assistant Principal Keeper, sees that buildings and equipment are properly maintained and acts as Principal Keeper in his absence. In a large prison the Correction Captain is responsible to the Principal Keeper; in a smaller institution, the position includes administrative responsibilities as assistant to the officer in charge of the entire custodial service. QUALIFICATIONS: One year of permanent service as Correction Lieutenant, or two years permanent service as Correction Sergeant.

ASSISTANT PRINCIPAL KEEPER is the assistant to the Principal Keeper of a prison in administering the system of custodial care of inmates: assigns all officers to their duties, reports violations of rules to the Principal Keeper, keeps time records, has charge of the morning and evening roll call, has charge of the armory, inspects firearms, sees that buildings and equipment are properly maintained and that the security, well-being, and discipline of the inmates are preserved. He assumes the duties of the Principal Keeper in his absence. The Assistant Principal Keeper is subject to the direction of the Principal Keeper or the Warden. The work involves extensive supervisory responsibility over the entire staff of officers. QUALIFICATIONS: Two years of permanent service as Correction Lieutenant or one year of permanent service as Correction Captain.

PRINCIPAL KEEPER at a prison or Assistant Superintendent at a Correction institution plans and directs the entire system of custodial care of inmates: coordinates institution activities in order to maintain safe custody and order; develops and directs a disciplinary program, designed to

meet individual needs and to further the corrective influences of the institution; makes frequent inspections of all divisions to see that the policies, rules and regulations of the department and institution are carried out; supervises the training of new employees and assumes the full duties of the Warden or Superintendent during his absence. An incumbent has full control over and responsibility for the custodial service and care of inmates subject to the approval of his superior and the rules and regulations of the Department of Correction. QUALIFICATIONS: Two years of permanent service as Correction Captain, or one year of permanent service as Assistant Principal Keeper.

WARDEN in a prison or Superintendent in a Correction institution is the Chief Executive Officer: prescribes the rules and regulations of the institution within the limits of general policies and regulations of the Commissioner of Correction; maintains corrective treatment program; assigns and reviews the work of department heads, such as vocational training, industries, farm and plant maintenance, business management, education, and kitchens; performs inspections to see that the institution is maintained efficiently. Supervision is received through submission of periodic reports and conferences with the Commissioner of Correction. QUALIFICATIONS: Three years of permanent service as Assistant Principal Keeper, or one year of permanent service as Principal Keeper or Assistant Superintendent.

KITCHENKEEPER supervises the preparation and service of food and the custody of inmates employed in the kitchen work in a penal institution: requisitions and rations food and inspects it before, during, and after preparation; plans

menus; estimates food requirements; instructs employees and inmates in cooking; maintains records of food and kitchen supplies and equipment; supervises the bake shop and the butcher shop, and may supervise the pasteurization of milk and canning of vegetables for institution use. The Warden or Principal Keeper reviews the Kitchenkeeper's work through inspection and report analysis, while the Institution Steward reviews the cost of operation. The Kitchenkeeper has direct supervision over from two to six civilian kitchen employees, 50 to 150 inmates assigned to kitchen work, and two to four Correction Officers. QUALIFICATIONS: Two years of permanent service as Correction Officer or one year permanent service as a Head Cook.

(December 1956) Series 8700.

Appendix J

NEW YORK CIVIL PRACTICE LAW AND RULES

ARTICLE 70

HABEAS CORPUS

SUMMARY OF ARTICLE

§ 7001. Application of article; special proceeding.

§ 7002. Petition.

(a) By whom made.
(b) To whom made.
(c) Content.

§ 7003. When the writ shall be issued.

(a) Generally.
(b) Successive petitions for writ.
(c) Penalty for violation.

§ 7004. Content of writ.

(a) For whom issued.
(b) To whom directed.
(c) Before whom returnable.
(d) When returnable.
(e) Expenses; undertaking.

§ 7005. Service of the writ.

§ 7006. Obedience to the writ.

(a) Generally; defects in form.

(b) Compelling obedience.
(c) Precept to bring up person detained.

§ 7007. Warrant preceding or accompanying writ.

§ 7008. Return.

(a) When filed and served.
(b) Content.

§ 7009. Hearing.

(a) Notice before hearing.
(b) Reply to return.
(c) Hearing to be summary.
(d) Sickness or infirmity of person detained.
(e) Custody during proceeding.

§ 7010. Determination of proceeding.

(a) Discharge.
(b) Bail.
(c) Remand.

§ 7011. Appeal.

§ 7012. Redetention after discharge.

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§ 7001. Application of article; special proceeding.

Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of *habeas corpus* and common law writs of certiorari

to inquire into detention. A proceeding under this article is a special proceeding.

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§ 7002. Petition.

(a) By whom made. A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf, may petition without notice for a writ of *habeas corpus* to inquire into the cause of such detention and for deliverance. A judge authorized to issue writs of *habeas corpus* having evidence, in a judicial proceeding before him, that any person is so detained shall, on his own initiative, issue a writ of *habeas corpus* for the relief of that person.

(b) To whom made. A petition for the writ shall be made to:

1. a special term of the supreme court, held in the judicial district in which the person is detained; or

2. the appellate division in the department in which the person is detained; or

3. any justice of the supreme court; or

4. a county judge being or residing within the county in which the person is detained; where there is no judge within the county capable of issuing the writ, or if all within the county capable of doing so have refused, the petition may be made to a county judge being or residing within an adjoining county.

(c) Content. The petition shall be verified and shall state, or shall be accompanied by an affidavit which shall state,

1. that the person in whose behalf the petition is ma
is detained, naming the person by whom he is detained a
the place of detention if they are known, or describi
them if they are not known; where the detention is
virtue of a mandate, a copy of it shall be annexed to t
petition, or sufficient reason why a copy could not be
tained shall be stated;

2. the cause or pretense of the detention, according
the best knowledge and belief of the petitioner;

3. that a court or judge of the United States does n
have exclusive jurisdiction to order him released;

4. if the writ is sought because of an illegal detenti
the nature of the illegality;

5. whether any appeal has been taken from any ord
by virtue of which the person is detained, and, if so, t
result;

6. the date, and the court or judge to whom made,
every previous application for the writ, the disposition
each such application and of any appeal taken, and t
new facts, if any, presented in the petition that were n
presented in any previous application; and

7. if the petition is made to a county judge outside t
county in which the person is detained, the facts whi
authorize such judge to act.

---

§ 7003. When the writ shall be issued.

(a) Generally. The court to whom the petition is ma
shall issue the writ without delay on any day, or, whe

the petitioner does not demand production of the person detained or it is clear that there is no disputable issue of fact, order the respondent to show cause why the person detained should not be released. If it appears from the petition or the documents annexed thereto that the person is not illegally detained or that a court or judge of the United States has exclusive jurisdiction to order him released, the petition shall be denied.

(b) Successive petitions for writ. A court is not required to issue a writ of *habeas corpus* if the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of *habeas corpus* and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it.

(c) Penalty of violation. For a violation of this section in refusing to issue the writ, a judge, or, if the petition was made to a court, each member of the court who assents to the violation, forfeits to the person detained one thousand dollars to be recovered by an action in his name or in the name of the petitioner to his use.

---

§ 7004. Content of writ.

(a) For whom issued. The writ shall be issued on behalf of the state, and where issued upon the petition of a private person, it shall show that it was issued upon his relation.

(b) To whom directed. The writ shall be directed to, and the respondent shall be, the person having custody of the person detained.

(c) Before whom returnable. A writ to secure the charge of a person from a state institution shall be m returnable before a justice of the supreme court or a co ty judge being or residing within the county in which person is detained; if there is no such judge it shall made returnable before the nearest accessible supr court justice,[1] county judge. In all other cases, the shall be made returnable in the county where it was issu except that where the petition was made to the supr court or to a supreme court justice outside the county which the person is detained, such court or justice m make the writ returnable before any judge authorized issue it in the county of detention.

(d) When returnable. The writ may be made retu able forthwith or on any day or time certain, as the requires.

(e) Expenses; undertaking. A court issuing a directed to any person other than a public officer may quire the petitioner to pay the charges of bringing up person detained and to deliver an undertaking to the son having him in custody in an amount fixed by the co to pay the charges for taking back the person detaine he should be remanded. Service of the writ shall not complete until such charge is paid or tendered and undertaking is delivered.

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§ 7005. Service of the writ.

A writ of *habeas corpus* may be served on any Service shall be made by delivering the writ and a copy

[1] So in original. Word "or" probably should be inserted.

the petition to the person to whom it is directed. If he cannot with due diligence be found, the writ may be served by leaving it and a copy of the petition with any person who has custody of the person detained at the time. Where the person to whom the writ is directed conceals himself or refuses admittance, the writ may be served by affixing it and a copy of the petition in a conspicuous place on the outside either of his dwelling or of the place where the person is detained. If the person detained is in the custody of a person other than the one to whom the writ is directed, a copy of the writ may be served upon the person having such custody with the same effect as if the writ had been directed to him.

---

§ 7006. Obedience to the writ.

(a) Generally; defects in form. A person upon whom the writ or a copy thereof is served, whether it is directed to him or not, shall make a return to it and, if required by it, produce the body of the person detained at the time and place specified, unless the person detained is too sick or infirm to make the required trip. A writ of *habeas corpus* shall not be disobeyed for defect of form so long as the identity of the person detained may be derived from its contents.

(b) Compelling obedience. If the person upon whom the writ or a copy thereof is served refuses or neglects fully to obey it, without showing sufficient cause, the court before whom the writ is returnable, upon proof of its service, shall forthwith issue a warrant of attachment against him directed to the sheriff in any county in which such per-

son may be found requiring him to be brought before the court issuing the warrant; he may be ordered committed in close custody to the county jail until he complies with the order of the court. Where such person is a sheriff, the warrant shall be directed to a person specifically designated to execute it. Such person shall have power to call to his aid the same assistance as the sheriff in executing the warrant; a sheriff shall be committed to a jail in a county other than his own.

(c) Precept to bring up person detained. A court issuing a warrant of attachment as prescribed in subdivision (b) may at the same time, or thereafter, issue a precept to the person to whom the warrant is directed ordering him immediately to bring before the court the person detained.

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§ 7007. Warrant preceding or accompanying writ.

A court authorized to issue a writ of *habeas corpus,* upon satisfactory proof that a person is wrongfully detained and will be removed from the state or suffer irreparable injury before he can be relieved by *habeas corpus,* shall issue a warrant of attachment directed to an appropriate officer requiring him immediately to bring the person detained before the court. A writ of *habeas corpus* directed to the person having custody of the person detained shall also be issued. Where it appears that the detention constitutes a criminal offense, the warrant may order the apprehension of the person responsible for the detention, who shall then be

brought before the court issuing the warrant and examined as in a criminal case.

---

§ 7008. Return.

(a) When filed and served. The return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding and filed at the time and place specified in the writ, or, where the writ is returnable forthwith, within twenty-four hours after its service.

(b) Content. The affidavit shall fully and explicitly state whether the person detained is or has been in the custody of the person to whom the writ is directed, the authority and cause of the detention, whether custody has been transferred to another, and the facts of and authority for any such transfer. A copy of any mandate by virtue of which the person is detained shall be annexed to the affidavit, and the original mandate shall be produced at the hearing; where the mandate has been delivered to the person to whom the person detained was transferred, or a copy of it cannot be obtained, the reason for failure to produce it and the substance of the mandate shall be stated in the affidavit.

---

§ 7009. Hearing.

(a) Notice before hearing. Where the detention is by virtue of a mandate, the court shall not adjudicate the issues in the proceeding until written notice of the time and place of the hearing has been served either personally eight

days prior to the hearing, or in any other manner or time as the court may order,

1. where the mandate was issued in a civil cause, upon the person interested in continuing the detention or upon his attorney; or,

2. where a person is detained by order of the family court, or by order of any court while a proceeding affecting him is pending in the said family court, upon the judge who made the order. In all such proceedings the court shall be represented by the corporation counsel of the city of New York, or outside the city of New York, by the county attorney; or,

3. in any other case, upon the district attorney of the county in which the person was detained when the writ was served and upon the district attorney of the county from which he was committed.

(b) Reply to return. The petitioner or the person detained may deny under oath, orally or in writing, any material allegation of the answering affidavits or allege any fact showing that the person detained is entitled to be discharged.

(c) Hearing to be summary. The court shall proceed in a summary manner to hear the evidence produced in support of and against the detention and to dispose of the proceeding as justice requires.

(d) Sickness or infirmity of person detained. Where it is proved to the satisfaction of the court that the person detained is too sick or infirm to be brought to the appointed place, the hearing may be held without his presence, may

be adjourned, or may be held at the place where the prisoner is detained.

(e) Custody during proceeding. Pending final disposition, the court may place the person detained in custody or parole him or admit him to bail as justice requires.

---

§ 7010. Determination of proceeding.

(a) Discharge. If the person is illegally detained a final judgment shall be directed discharging him forthwith. No person detained shall be discharged for a defect in the form of the commitment, or because the person detaining him is not entitled to do so if another person is so entitled. A final judgment to discharge a person may be enforced by the court issuing the order by attachment in the manner prescribed in subdivision (b) of section 7006.

(b) Bail. If the person detained has been admitted to bail but the amount fixed is so excessive as to constitute an abuse of discretion, and he is not ordered discharged, the court shall direct a final judgment reducing bail to a proper amount. If the person detained has been denied bail, and he is not ordered discharged, the court shall direct a final judgment admitting him to bail forthwith, if he is entitled to be admitted to bail as a matter of right, or if it appears that the denial of bail constituted an abuse of discretion. Such judgment must fix the amount of bail, specify the time and place at which the person detained is required to appear, and order his release upon bail being given in accordance with the code of criminal procedure.

(c) Remand. If the person detained is not ordered discharged and not admitted to bail, a final judgment shall be directed dismissing the proceeding, and, if he was actually produced in court, remanding him to the detention from which he was taken, unless the person then detaining him was not entitled to do so, in which case he shall be remanded to proper detention.

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§ 7011. Appeal.

An appeal may be taken from a judgment refusing to grant a writ of *habeas corpus* or refusing an order to show cause issued under subdivision (a) of section 7003, or from a judgment made upon the return of such writ or order to show cause. A person to whom notice is given pursuant to subdivision (a) of section 7009 is a party for purposes of appeal. The attorney general may appeal in the name of the state in any case where a district attorney might do so. Where an appeal from a judgment admitting a person to bail is taken by the State, his release shall not be stayed thereby.

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§ 7012. Redetention after discharge.

A person discharged upon the return of a writ of *habeas corpus* shall not be detained for the same cause, except by virtue of a subsequent lawful mandate.

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JAN 17 1966
JOHN F. DAVIS, C

(2260)

IN THE

Supreme Court of the United States

October Term, 1965

No. 219

JOHNNIE K. BAXSTROM,
Petitioner,

v.

R. E. HEROLD, Director, Dannemora State Hospital,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION AND BRIEF IN SUPPORT OF RESPONDENT'S MOTION

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent
The Capitol
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IN THE

Supreme Court of the United States

October Term, 1965

No. 219

JOHNNIE K. BAXSTROM,

Petitioner,

v.

R. E. HEROLD, Director, Dannemora State Hospital,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Motion for Leave to File Brief as to New Matters Brought Out by the Supreme Court During Oral Argument

Respondent respectfully asks consideration of this motion for leave to file a short brief as to new matters for the following reasons:

(1) Briefs and oral arguments on both sides did not crystallize exactly how the right to a jury trial as granted to the civilly insane by the statutes of New York is limited;

(2) The Court's references to the impact of "accident of time" would seem to call for response from respondent;

(3) The issues and the answers might well be more clearly outlined by granting consideration to this added material.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION

Additional Statute Involved

Mental Hygiene Law § 101.

§ 101. Proceeding for declaration of incompetency and appointment of committee generally

(1) Petitioner; duty of superintendent of poor. Any person may commence a special proceeding to declare a person incompetent and to appoint a committee of an incompetent. Where the property of any person is endangered by reason of his incompetency and no proceeding has been commenced, the officer performing the function of superintendent of the poor of the place where such person resides shall bring the proceeding; his expenses shall be audited and allowed in the same manner as other official expenses.

(2) Venue. The proceeding shall be brought in the Supreme Court or before a justice of the Supreme Court within the judicial district, or in the county court or before the county judge of the county, where the alleged incompetent resides; or, if he is an inmate of a state mental institution, where the institution is situated or where he resided before he became an inmate. If the incompetent resides without the state, or if his residence cannot be ascertained, his residence shall be deemed the county where some of his property is situated.

(3) Contents of petition. The petition shall be verified and, insofar as can be ascertained with reasonable diligence, shall state facts showing incompetence; the names and residences of the spouse of the incompetent, the person with whom he resides, and his known distributees at the date of the petition; and the nature, probable value

and income of his property and what property has been conveyed during the period of alleged incompetency, to whom and for what consideration.

(4) Notice of petition. Unless the court orders otherwise, notice of petition shall be served upon the alleged incompetent and his spouse or if none is known to the petitioner, the distributees at the date of the petition, if known, or if none is known, the person with whom he resides. If the person alleged to be incompetent is an inmate of a state institution, notice shall also be given to the officer in charge of the institution. The court shall direct such further notice of the proceeding as it deems proper.

(5) Trial on issue of incompetency. Unless the court decides, in the exercise of its discretion, that the proceeding should be dismissed, it shall order a trial by jury of the issue of competency. The court may order a special jury empanelled. Alternatively, the court may order an inquiry into the issue of competency by the issuance of a commission, in which case the provisions of subdivision six of this section shall govern. Upon the return of such commission, or upon the rendering of the verdict of the jury, the court either must direct a new trial or issue a new commission or make such final order upon the petition as justice requires.

(6) Proceedings upon trial by jury before commissioners. The commission must direct the commissioners to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions with respect to the subjects of inquiry or the manner of executing the commission as the court directs to be inserted therein, subject to rules.

The commissioners, or a majority of them, immediately must issue a precept to the sheriff of the county to direct the county clerk or the commissioner of jurors, as the case may be, to draw and summon not less than twelve nor more than twenty-four indifferent persons, qualified to serve and not exempt from serving as trial jurors in the same court, to appear before the commissioners at a specified time and place within the county, to make inquiry as commanded by the commission. The commissioner of jurors, or the county clerk must draw and summon the jurors accordingly, and must return the precept and the names of the persons notified to the commissioners at the time and place specified. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend, of a person who has been duly notified, his attendance may be compelled; and he may be punished by the court for a contempt, as where a juror duly notified fails to attend at a trial term of the court. The commissioners may require the sheriff to direct the commissioner of jurors, or the county clerk, to draw and summon an additional juror, as provided by law to attend in place of a juror notified and not attending, or who is excused or discharged. But it is not necessary to cause any additional juror to attend if at least twelve of the persons summoned appear and are sworn.

All the commissioners must attend and preside at the hearing; and they, or a majority of them, with respect to the proceedings upon the hearing, have all the power and authority of a judge of the court holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their dis-

agreement to the commissioners, who must thereupon discharge them and procure another jury.

The inquisition must be signed by the jurors concurring therein, and by the commissioners or a majority of them, and be annexed to the commission. The commission and inquisition must be returned by the commissioners and filed with the clerk.

The petitioner must pay the compensation of the commissioners and sheriff. The compensation of jurors shall be paid by the county in the manner provided by law for the payment of jurors upon a trial of an issue in an action in the same court.

(7) Injunction; temporary receiver. Where it satisfactorily appears from the petition and affidavits that any person has acquired any property from the alleged incompetent during the time of such alleged incompetency without adequate consideration, the court may, with or without security, restrain such person from selling, assigning or disposing of said property or confessing a judgment which may become a lien on said property during the pendency of the proceeding hereunder. Such order may, in the discretion of the court, be continued for ten days after the appointment of a committee. Notice of the appointment of a committee shall be given to any person enjoined in such manner as the court may prescribe. The court may appoint a temporary receiver to preserve the property of the alleged incompetent pending adjudication of incompetency.

(8) Notice of pendency. In all proceedings under this article, if real property or any interest therein is or may be affected, the petitioner shall, prior to final judgment, file a notice of pendency.

(9) Costs. Where a judgment is made dismissing a petition, the court may award a fixed sum as costs, not exceeding fifty dollars and disbursements, to be paid by the petitioner to the alleged incompetent. Where the petition is granted, the court shall direct the payment out of the funds of the incompetent, of the necessary disbursements of the petitioner and of such a sum for his costs and reasonable counsel fees. In its discretion, the court may direct the committee to pay a sum not exceeding fifty dollars and disbursements, to the attorney for any person opposing the adjudication.

ARGUMENT

During oral argument before the Court, questions by the Justices brought forth matters that would seem to require brief exposition in the interests of truth and justice.

I

Preliminarily, we respectfully call attention to the fact that New York does *not* grant a statutory right to a jury trial without restriction in a civil proceeding to have a person committed as insane. New York limits the right to a jury *"as in the case of proceedings for the appointment of committee for a mentally ill person."* Mental Hygiene Law § 74 (A-31). This is a restriction that was not brought out by either side at any time.

By this limiting phrase, § 74 incorporated Mental Hygiene Law § 101 (quoted *supra*). And the entire spirit of § 101, with its detailed attention to property rights, costs and fees, manifests a primary legislative concern for matters other than the single question of establishing sanity by means of a jury trial only. On the other hand, § 384 involves the

solitary question of sanity—minus side issues and other distracting factors.

We therefore maintain that the different issues necessarily involved under §§ 74 and 101 of the Mental Hygiene Law justify the different procedures prescribed therein. As against the single issue of mental condition under Correction Law § 384, surely there is substantial reason for different approaches and different procedures—as intended by the Legislature. These prescribed procedures, painstakingly created according to needs of each class of persons, do not constitute a denial of equal protection to the criminally insane.

II

The Justices, in interrogation, pointed out that "an accident of time" was responsible for the denial, under New York law, of a jury trial in the case of an insane person retained at expiry of his prison sentence. The Justices pointed out that this same person, were he out on the street (because of release from prison) and *then* submitted to a sanity hearing, could demand a jury trial. Our discussion *supra* shows that such a demand is hardly unrestricted, when weighed in light of all related statutes.

But further, we respectfully submit that one who is adjudged insane *while serving time in a prison cell* is affected with equal force by "accident of time" as is one whose term has expired and yet continues to be retained as insane. The insane criminal, too, would be out on the street and entitled to identical rights—alas but for the accident of time. By that logic, he too should have a jury to test his sanity—not under Correction Law § 384, but under Correction Law § 383.

Then where is the logical end? In *habeas corpus,* in any proceeding at any time, may any person at any time demand a jury trial at a sanity hearing? We believe not for the reasons presented here as well as for the reasons set forth in our brief at pages 8 and 16.

CONCLUSION

It is respectfully submitted that the order of the Court of Appeals of the State of New York should be affirmed.

Dated: December 28, 1965.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 219.—October Term, 1965.

Johnnie K. Baxstrom, Petitioner, *v.* R. E. Herold, Director, Dannemora State Hospital.	On Writ of Certiorari to the Court of Appeals of New York.

[February 23, 1966.]

Mr. Chief Justice Warren delivered the opinion of the Court.

We granted certiorari in this case to consider the constitutional validity of the statutory procedure under which petitioner was committed to a mental institution at the expiration of his criminal sentence in a state prison.

Petitioner, Johnnie K. Baxstrom, was convicted of second degree assault in April 1959 and was sentenced to a term of two and one-half to three years in a New York prison. On June 1, 1961, he was certified as insane by a prison physician. He was then transferred from prison to Dannemora State Hospital, an institution under the jurisdiction and control of the New York Department of Correction and used for the purpose of confining and caring for male prisoners declared mentally ill while serving a criminal sentence. In November 1961, the director of Dannemora filed a petition in the Surrogate's Court of Clinton County stating that Baxstrom's penal sentence was about to terminate and requesting that he be civilly committed pursuant to § 384 of New York Correction Law.

On December 6, 1961, a proceeding was held in the Surrogate's chambers. Medical certificates were submitted by the State which stated that, in the opinion of two of its examining physicians, Baxstrom was still mentally ill and in need of hospital and institutional

care. Respondent, then assistant director at Dannemora, testified that in his opinion Baxstrom was still mentally ill. Baxstrom, appearing alone, was accorded a brief opportunity to ask questions.[1] Respondent and the Surrogate both stated that they had no objection to his being transferred from Dannemora to a civil hospital under the jurisdiction of the Department of Mental Hygiene. But the Surrogate pointed out that he had no jurisdiction to determine that question—that under § 384 the decision was entirely up to the Department of Mental Hygiene. The Surrogate then signed a certificate which indicated he was satisfied that Baxstrom "may require mental care and treatment" in an institution for the mentally ill. The Department of Mental Hygiene had already determined *ex parte* that Baxstrom was not suitable for care in a civil hospital. Thus, on December 18, 1961, the date upon which Baxstrom's penal sentence expired, custody over him shifted from the Department of Correction to the Department of Mental Hygiene, but he was retained at Dannemora and has remained there to this date.

Thereafter, Baxstrom sought a writ of habeas corpus in a state court. An examination by an independent psychiatrist was ordered and a hearing was held at which the examining psychiatrist testified that, in his opinion, Baxstrom was still mentally ill. The writ was dismissed. In 1963, Baxstrom applied again for a writ of habeas corpus, alleging that his constitutional rights had been violated and that he was then sane, or if insane, he should be transferred to a civil mental hospital. Due to his indigence and his incarceration in Dannemora, Baxstrom

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[1] The State apparently permits counsel to be retained in such proceedings where the person can afford to hire his own attorney despite the fact that § 384 makes no provision for counsel to be present. See 1961 Op. N. Y. Atty. Gen. 180, 181. Baxstrom is indigent, however, and had no counsel at this hearing.

could not produce psychiatric testimony to disprove the testimony adduced at the prior hearing. The writ was therefore dismissed. Baxstrom's alternative request for transfer to a civil mental hospital was again denied as being beyond the power of the court despite a statement by the State's attorney that he wished that Baxstrom would be transferred to a civil mental hospital. On appeal to the Appellate Division, Third Department, the dismissal of the writ was affirmed without opinion. 21 A. D. 2d 754. A motion for leave to appeal to the Court of Appeals was denied. 14 N. Y. 2d 490. We granted certiorari. 381 U. S. 949.

We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence.

Section 384 of New York Correction Law prescribes the procedure for civil commitment upon the expiration of the prison term of a mentally ill person confined in Dannemora.[2] Similar procedures are prescribed for civil

[2] As it appeared when applied to petitioner in 1961, N. Y. Correction Law § 384 provided in part:

"1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall, if satisfied that

commitment of all other allegedly mentally ill persons. N. Y. Mental Hygiene Law §§ 70, 72. All persons civilly committed, however, other than those committed at the expiration of a penal term, are expressly granted the right to *de novo* review by jury trial of the question of their sanity under § 74 of Mental Hygiene Law. Under this procedure any person dissatisfied with an order certifying him as mentally ill may demand full review by a jury of the prior determination as to his competency. If the jury returns a verdict that the person is sane, he must be immediately discharged. It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.

The Director contends that the State has created a reasonable classification differentiating the civilly insane from the "criminally insane," which he defines as those with dangerous or criminal propensities. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. *Walters* v. *City of St. Louis*, 347 U. S. 231, 237. Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*. For purposes of granting

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such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments."

judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.

The statutory procedure provided in § 384 of New York Correction Law denied Baxstrom the equal protection of the laws in another respect as well. Under § 384 the judge need only satisfy himself that the person "may require care and treatment in an institution for the mentally ill." Having made such a finding, the decision whether to commit that person to a hospital maintained by the Department of Correction or to a civil hospital is completely in the hands of administrative officials.[3]

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[3] In this case, the administrative decision to retain Baxstrom in Dannemora was made before any hearing was afforded to Baxstrom and was made despite the otherwise unanimous conclusion by testifying psychiatrists, including an independent examining psychiatrist and respondent himself, that there was no reason why Baxstrom could not be transferred to a civil institution. The following is a portion of the transcript of the hearing before the Surrogate:

"The COURT: (Addressing Dr. Herold) Have you any objection if this man is transferred to a civil hospital if the Department of Mental Hygiene so decrees?

"Dr. HEROLD: None whatever.

"The COURT: And I, Sir, agree with you. I have no objection to his transfer if the Department of Mental Hygiene so finds.

"I hope that you will be transferred to a civil hospital.

"Good luck."

And at the first habeas corpus hearing:

"Q. Do you feel, Doctor, from your examination and examining the records of this man, he needs additional care? Is that correct?

"A. [Dr. Kerr] Yes, sir. May I say something at this point, sir?

"Q. Surely.

"A. Since Mr. Baxstrom's sentence has actually expired, sir, I would like to say that in my opinion there is no reason why he could not be treated in a civil mental hospital. I would simply like to say that fof the record, sir.

"The COURT: All right."

Except for persons committed to Dannemora upon expiration of sentence under § 384, all others civilly committed to hospitals maintained by the Department of Correction are committed only after judicial proceedings have been held in which it is determined that the person is so dangerously mentally ill that his presence in a civil hospital is dangerous to the safety of other patients or employees, or to the community.[4]

This statutory classification cannot be justified by the contention that Dannemora is substantially similar to other mental hospitals in the State and that commitment to one hospital or another is simply an administrative matter affecting no fundamental rights. The parties have described various characteristics of Dannemora to show its similarities and dissimilarities to civil hospitals in New York. As striking as the dissimilarities are, we need not make any factual determination as to the nature of Dannemora; the New York State Legislature has already made that determination. By statute, the hospital is under the jurisdiction of the Department of Correction and is used for the purpose of confining and caring for insane prisoners and persons, like Baxstrom, committed at the expiration of a penal term. N. Y. Correction Law § 375. Civil mental hospitals in New York, on the other hand, are under the jurisdiction and

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[4] N. Y. Mental Hygiene Law §§ 85, 135. See also N. Y. Code Crim. Proc. §§ 662–b (3)(b), 872 (1)(b), as amended, N. Y. Laws 1965, c. 540, §§ 1, 2. Former § 412 of Correction Law, permitting commitment to Matteawan State Hospital of any patient who had previously been sentenced to a term of imprisonment, without the benefit of the proceeding accorded others under § 85 of Mental Hygiene Law, was held unconstitutional as a denial of equal protection in *United States ex rel. Carroll* v. *McNeil*, 294 F. 2d 117 (C. A. 2d Cir. 1961), probable jurisdiction noted, 368 U. S. 951, vacated and dismissed as moot, 369 U. S. 149, and was repealed by N. Y. Laws 1965, c. 524. Even that provision required a showing that the person still manifested criminal tendencies.

control of the Department of Mental Hygiene. Certain privileges of patients at Dannemora are restricted by statute. N. Y. Correction Law § 388. Moreover, as has been noted, specialized statutory procedures are prescribed for commitment to hospitals under the jurisdiction of the Department of Correction. While we may assume that transfer among like mental hospitals is a purely administrative function, where, as here, the State has created functionally distinct institutions, classification of patients for involuntary commitment to one of these institutions may not be wholly arbitrary.

The Director argues that it is reasonable to classify persons in Baxstrom's class together with those found to be dangerously insane since such persons are not only insane but have proven criminal tendencies as shown by their past criminal record. He points to decisions of the New York Court of Appeals supporting this view. *People ex rel. Kamisaroff* v. *Johnston,* 13 N. Y. 2d 66; *People ex rel. Brunson* v. *Johnston,* 15 N. Y. 2d 647.

We find this contention untenable. Where the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term.[5] It may or may not be that Baxstrom

[5] In oral argument, counsel for respondent suggested that the determination by the Department of Mental Hygiene to retain a person in Dannemora must be based not only on his past criminal record, but also on evidence that he is currently dangerous. Far from supporting the validity of the procedure, this only serves to further accent the arbitrary nature of the classification. Under this procedure, all civil commitments to an institution under the control of the Department of Correction require a determination that the person is presently dangerous; all persons so committed are entitled to a judicial proceeding to determine this fact except those awaiting expiration of sentence. Their fate is decided by unreviewable determinations of the Department of Mental Hygiene.

is presently mentally ill and such a danger to others that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same.

The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the full benefit of a judicial hearing to determine dangerous tendencies is withheld only in the case of civil commitment of one awaiting expiration of penal sentence. A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears.

In order to accord to petitioner the equal protection of the laws, he was and is entitled to a review of the determination as to his sanity in conformity with proceedings granted all others civilly committed under § 74 of New York Mental Hygiene Law. He is also entitled to a hearing under the procedure granted all others by § 85 of New York Mental Hygiene Law to determine whether he is so dangerously mentally ill that he must remain in a hospital maintained by the Department of Correction. The judgment of the Appellate Division of the Supreme Court, in the Third Judicial Department of New York is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.